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CURRENT EVENTS.

THE OBLIGATION OF CONTRACTS—FEDERAL JURISDICTION.—The provision of the constitution of the United States which forbids States to enact laws that impair the obligation of contracts, has been so often before the supreme court that we might well suppose that every phase of the subject had been exhausted. It is said, however, that a case is now pending in that court which presents a new question. Whether it is really new or an old friend with a new face cannot be certainly known until after its decision shall appear in the reporters.

We are led to the consideration of this subject by the perusal of an article in a New York newspaper, bearing the *ad captandum* title, "Can States Nullify the Constitution?" It consists of two letters—one from a firm of bankers to Edward L. Andrews, Esq., asking information upon the subject of a case pending in the Supreme Court of the United States, and his views on the questions involved therein. Mr. Andrews' reply gives his opinion that the constitution of the United States creates a number of rights which he denominates, "cases arising under the constitution." The jurisdiction of these cases and the enforcement of these rights are committed to the federal judiciary, irrespective of all questions of jurisdiction of parties; that among these rights is that of redress for any infringement by a State of the clause which forbids it to enact laws impairing the obligation of contracts: that in such a case federal courts have jurisdiction, no matter who are parties to the action, provided the subject-matter involves one of these federal rights. The case referred to by the bankers is that of a citizen of North Carolina, who brought suit against that State, claiming redress for injuries suffered or losses incurred by reason of its infraction of the clause of the constitution to which we have referred, and he expresses his opinion that the federal court has jurisdiction of the case, which does not fall within the prohibition of the constitution or of the eleventh amendment thereto.

We think we have fairly stated the propositions which Mr. Andrews asserts to be in accordance with the constitution of the United States, and in commenting upon them we may remark, in the first place, that the government of the United States is one of limited powers; that those powers which are not conferred upon it directly by the constitution or by fair implication therefrom, are reserved to States respectively or to the people; that among the powers conferred upon the United States by the constitution is that of establishing a judiciary system, the courts of which shall have jurisdiction of "all cases in law and equity arising under this constitution;" that in the same section in which this power is granted, the jurisdiction of federal courts is limited to a class of cases in which the parties are of a special description. As to all controversies between States, between citizens of different States and between a State and the citizens of another State.[1]

It may be remarked that in this section is given no jurisdiction of controversies between a State and one of its own citizens, and that the expression of such controversies between a State and citizens of another State excludes the inference that that jurisdiction is conferred in cases of controversies between a State and its own citizens. *Expressio unius exclusio alterius.* By the eleventh amendment the jurisdiction of federal courts in controversies between a State and citizens of another State is taken away. This amendment was adopted about six years after the constitution went into operation, and since that time it has not been possible that, as a matter of jurisdiction, a State could be sued in a federal court by a citizen of another State, and the broad language used in that amendment indicates very clearly that the framers of the constitution intended to include in the restriction all cases, no matter of what character, between a State and citizens of another State, or a State and citizens of a foreign State. The language of the amendment is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

1 Const. U. S., art. III, § 2.

United States by citizens of another State, or by citizens or subjects of any foreign State."

If, in the original constitution, jurisdiction had been given to federal courts, of controversies between a State and its own citizens, that jurisdiction would remain intact under the legal maxim—*Expressio unius exclusio alterius*, but as no such jurisdiction was given in terms or by implication, that maxim does not apply, and the eleventh amendment serves only, by its sweeping language, to interpret the meaning of article III., §§ 1 and 2 of the constitution.

Considered in the light of the language of the eleventh amendment, it would appear that the limitation of jurisdiction as to parties prescribed in article III. of the constitution, extended to all suits at law or in equity, of which federal courts had jurisdiction, including as well those arising under the constitution as all others.

This is the view that would naturally be taken of the subject upon a strict construction of the constitution. Under a more liberal interpretation, however, the opinions of Mr. Andrews and those who think with him are worthy of serious consideration. According to their views, the article of the constitution confers jurisdiction upon federal courts on two separate and distinct grounds; one with reference to the subject-matter of the controversy, irrespective of the parties; the other because of the *status* of the party without regard to the nature of the cause of action. Thus they might well say, that federal courts have jurisdiction of an admiralty suit between next door neighbors, because admiralty is within the exclusive jurisdiction of those courts, and they may likewise take cognizance of a common law action merely because the plaintiff and defendant are citizens of different States.

The real question before the court would seem to be, whether the third article of the constitution confers jurisdiction upon federal courts in this double aspect, and upon these two several and separable grounds? We think that the sum of the whole matter is this: that the States as absolute sovereignties or senior to the United States government; that they conceded to that government the powers enumerated in the constitution and farely to be implied therefrom; that immunity from legal coercion is an inherent incident of all sovereignty; that a concession of such immunity cannot be implied but must be expressly granted and that consequently there being no express grant of power to the fed eral courts to entertain suit against States by there own citizens, no such jurisdiction can exist. The States conceded by the constitution the power to pass laws imparing the obligation of contracts, and federal courts have power to enforce that concession as against all parties over whom they have jurisdiction, but the States did not expressly concede to the federal government the power to enforce the concession against themselves. As this is alleged to be a new question never before presented to the supreme court, we have treated it as *res integra*, not citing a single case on either side of the controvery, and we will await with interest the decision of the question.

NOTES OF RECENT DECISIONS.

CARRIERS —PASSENGERS—CARE REQUIRED —The Supreme Court of Kansas recently decided a case, not yet reported, involving the question whether street car companies are bound to exercise the same degree of care for the safety of their passengers that is required of carriers who transport their passengers in vehicles propelled by steam, and if not, what degree of care is required of them.

The facts were that the plaintiff was a passenger on one of defendant's open cars. The car was crowded and defendant stood on the foot-board by which the car was entered. The car was shunted off on a side-track to allow another car to pass, and in passing that car crushed plaintiff between itself and the post of the car on which he stood. He brought suit, and the defense set up was that, although the cause of the accident was that the open car was not run upon the side-track as far as it should have been, the company was not responsible in damages, because it was not bound to exercise the same high degree of caution and care for the safety of its passengers that is required of railroad companies using cars propelled by steam. In other words, the defense was that a man who pays a nickel to ride a dozen blocks in a city is not entitled to the same protection for

his life and limbs as one who rides in a Pullman from New York to San Francisco and pays full fare therefor. The court sustained the demand of the plaintiff and says:

"This rule applies in this State to all vehicles used to carry passengers for hire, the only difference being in the means and instrumentalities used, rather than to the degree in which the preventive means be applied. To each and every method of carrying passengers for hire must be applied the greatest skill, care and forethought to which they are in their nature susceptible, to avoid liability for injuries occasioned by their operation. When a street railway company undertakes to carry large crowd of people, vastly in excess of the seating capacity of their cars, and permit passengers to ride on the platforms and foot-boards of their cars without objection, and collect fares from them, stop their cars when in such a crowded condition that no seats are attainable, and permit persons to get upon them to be carried from place to place, and when the employes of the company run their cars so near the intersection of a switch with the main track that the cars on each cannot pass without injury to passenger, the company is guilty of gross negligence."

PAYMENT OF SERVICES AND SUPPORT BETWEEN MEMBERS OF FAMILY.

I. Purpose of Paper.
II. Governing Principles.
III. What Relations Rebut Presumption of Contract.
IV. When Contract Created.

I. *Purpose of Paper.*—It is the purpose of this paper to state the principles of law applicable to the family relation, with reference to the payment for services, board, etc.

II. *Governing Principles.*—The principles of law governing the relation of persons of the same family, as regards compensation for services, board, etc., are essentially different from the rules applicable to other relations of individuals, as the intimacy and mutual dependence of the former class are not to be found in the latter. Hence, the general principle of implied contracts, which is of almost universal application, that when one person does work for another, or provides him with board, necessaries, etc., with the knowledge and approbation of that other, the law will imply a promise on the part of the person benefited thereby to make a reasonable compensation therefor, is not controling, but rather such implication is rebutted when it appears that the family relation existed between the parties. This relation is such as to show some other inducement than a pecuniary one for the labor performed or supplies furnished.[1] The conditions are not such as, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.[2]

The relation of debtor and creditor is commonly presumed from the performance and receipt of service, but where the relation of the parties are such as to negative the idea that services were rendered in expectation of payment, they cannot be made the basis of a legal claim.[3] Thus, where services are rendered in the expectation of a legacy, the law will not imply a promise to pay for them.[4]

It is also a well established rule that where a person is under a legal liability to pay money or to discharge a duty, the law implies a promise to do it. But no promise can be implied from that which is a mere gratuity. And where it is shown that the person rendering the service is a member of the family of the person served and receiving support therein, either as a child, a relative of a visitor, a presumption of law arises that such services were gratuitous, and in such case, before the person rendering the services can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving and by the other of making compensation therefor.[5] So where

[1] Ayres v. Hull, 5 Kan. 419, 421.
[2] Hertzog v. Hertzog, 29 Pa. St. 460, 468.
[3] Hartman's Appeal, 3 Grant's Cas. (Pa.), 271.
[4] Swires v. Parsons, 5 W. & S. (Pa.) 358. "If it were not so a man might be made a debtor without his consent, and even without his knowledge:" Hartman's Appeal, 3 Grant's Cas. (Pa.) 275.
[5] Scully v. Scully, 28 Iowa, 550, 551; Sawyer v. Hebard, 58 Vt. 375; s. c., 3 Atl. Rep. 529; Updike v. Titus, 13 N. J. Eq. 151; House v. House, 6 Ind. 60; Allen v. Allen, 60 Mich. —; s. c., 27 N. W. Rep. 702; Johnson v. Ghost, 11 Neb. 444; s. c., 8 N. W. Rep. 391; Wilson v. Wilson, 52 Iowa, 44; s. c., 2 N. W. Rep. 615; Cobb v. Bishop, 27 Vt. 624; Administrator of Way v Way's Estate, 27 Vt. 625; Davis v. Goodenow, 27 Vt.

a person invites a stranger to his house, he cannot turn round and make him a debtor for food, attendance or necessaries furnished him.[6] This is the general rule, but it is said in a recent Pennsylvania case that in all cases, except that of parent and child, there must be evidence, beyond the relationship, that the creation of no debt was intended.[7]

III. *What Relationship Rebuts Presumption of Contract.*—Mere consanguinity will not necessarily rebut the presumption of a contract.[8] But to have this effect the family relation must in fact exist between the parties.

The relation of parent and child rebuts the presumption of an implied contract of payment for service or board.[9] Thus, no action will lie by a son against his mother for board and washing, where she lives with him as a member of the family, assisting as far as she can—she being old and feeble—in the housework.[10] So where a son continues to live with his father after majority, he cannot recover wages.[11] And where a daughter marries but continues to live with her parents and perform such service as she did before marriage, no implication to pay therefor arises.[12] And these rules also apply with equal force to a foster or step-child,[13] though such child has reached his majority.[14]

The relationship of husband wife is such that no action for services can be maintained upon the part of either against the other.[15]

Like considerations apply to brothers and sisters who occupy family relations.[16] Yet, it appears to be a reasonable rule, as announced in a recent case, that where the parties sustain this relation, the sister claiming compensation for her services, the burden of showing family relationship, or other cause, to exclude the implication of his promise to pay for the services, is upon the brother. Because of the fact that they are brother and sister, less evidence besides would be required to establish that they lived together as a family than if they were strangers. If he shows that they so lived, the jury ought not to find an implied promise.[17]

The relationship of uncle and nephew,[18] or uncle and niece,[19] living in one family, are treated similarly.

The same rules are applicable as between grandparents and grandchildren likewise situated. In Thorp v. Bateman[20] the action was for board and support of an infant daughter of defendant. The case made by plaintiff was substantially this: That his wife was the grandmother of defendant's daughter, and the latter was taken into his family when a very young child, where she remained and was supported by him for several years, under an agreement that she should live there until she became of legal age; that his wife having died, defendant came and took his daughter away against the will of plaintiff and without making any compensation, thereby depriving the latter of the benefit he might have derived from the labor of the daughter afterwards. No recovery was allowed. Cooley, C. J., who gave the opinion, observed that, under such circumstances, "the child comes in as a member of the family, and for the time being occupies substantially the same position as would a member of the family by nature." While a granddaughter cannot recover for services of the grandfather when living with him as a member of the family,[21] yet it is held that such relationship does not rebut the presumptinn so as to throw upon the party claiming to recover the *onus*

715; Putnam v. Town, 34 Vt. 429; Sprague v. Waldo, 38 Vt. 141; Lunay v. Vantyne, 40 Vt. 501; Harris v. Currier, 44 Vt. 463; Doane v. Doane, 46 Vt. 485; Briggs v. Briggs, 46 Vt. 571; Coe v. Wagner, 42 Mich. 49; s. c., 3 N. W. Rep. 248.

[6] Marriner v. Collins, 5 Harrington (Del.), 290.

[7] Curry v. Curry, 114 Pa. St. —; s. c., 7 Atl. Rep. 61, 63.

[8] Moyer's Appeal, 112 Pa. St. 290; 3 Atl. Rep. 811; Mayfaith's Appeal (Pa.), 2 Atl. Rep. 28; O'Connor v. Beckwith (Mich.), 3 N. W. Rep. 166.

[9] Harris v. Currier, 44 Vt. 468; Cohen v. Cohen, 2 Mackey (D. C.), 227; Wilson v. Wilson, 52 Iowa, 44; Traver v. Shiner, 65 Iowa, 57; s. c., 21 N. W. Rep. 159; Bishop on Cont. (2d ed.) § 230.

[10] Greenwell v. Greenwell, 28 Kan. 675.

[11] Hertzog v. Hertzog, 29 Pa. St. 465. See note 32.

[12] Houck v. Houck, 99 Pa. St. 552. See note 32.

[13] Williams v. Hutchinson, 3 N. Y. 312; s. c., 5 Barb. 128.

[14] Guenther v. Birkick, 22 Mo. 439; Andrus v. Foster, 17 Vt. 556, 560. See note 32.

[15] Bishop on Cont. (2d ed.) § 229.

[16] Scully v. Scully, 28 Iowa, 548; Morris v. Barnes, 35 Mo. 412; Hall v. Finch, 29 Wis. 278; Keegan v. Malone, 62 Iowa, 208, 211; Ayres v. Hull, 5 Kan. 419; Robinson v. Cushman, 2 Denio (N. Y.), 149; Taylor v. Lincenufelter, 65 Tenn. (1 Lea) 83; Bishop on Cont. (2d ed.) § 223.

[17] Curry v. Curry, 114 Pa. St. —; s. c., 7 Atl. Rep. 61, 63.

[18] Defrance v. Austin, 9 Pa. St. 308; Weir v. Weir, 3 B. Mon. 645.

[19] Hays v. McConnell, 42 Ind. 285.

[20] 37 Mich. 68.

[21] Butler v. Slam, 50 Pa. St. 456, 461.

of proving a special contract.[22] A grandson cannot recover, in the absence of a contract of hiring, for services rendered to his aged grandparents by sleeping in their house and caring for their wants during the night.[23]

The family relation also excludes the idea of an implied contract of parties related by marriage for the reasons above stated.[24] Thus, a son-in-law cannot recover for board and attendance during the sickness of his mother-in-law who lives with him as a member of his family.[25] Nor can he recover for occasional services as a farm hand, while he lives with the parents of his wife.[26] In Faloon v. McIntyre,[27] an aged father made his home with his married daughter for sixteen years, during which time there was no accounting between him and his son-in-law, a physician, and the latter made no charge for medical services, nor any claim for board, or necessaries or supplies furnished, but, on the contrary, gave his notes to the father-in-law at different times for considerable sums of money and continued to make payments thereon, and the father-in-law conveyed to him property worth $6,000 for $2,500,—it was held that these facts negatived the idea of any contract of the father-in-law to pay for support.

Upon substantially the same grounds as heretofore stated a stranger received into a family as a member thereof, is subject to like rules.[28] Hence, menial service by such persons, in the absence of a contract, raises no implied promise to pay wages or to educate,[29] whether he is received as a member of defendant's family in the character of a friend,[30] dependant or protege.[31]

These rules are applicable, though perhaps not of equal force, after the minor has attained legal majority.[32] In the nature of the case it is difficult to lay down a general rule upon the subject. Every case will be more or less affected by its own peculiar circumstances. The amount and kind of labor, the ability and necessity of the parent, the course of dealing between the parties, whether they keep accounts or not, whether the demand for compensation is made early or is delayed many years after the relation began, or, after its determination—these and many other similar circumstances, will be significant indications of the expectation of the parties, at the time of the relation subsisting, which should determine their rights.[33] The observations of Chief Justice Shaw, in Guild v. Guild,[34] are valuable. He says: "Such a continued residence of a daughter may, indeed must be regarded under one of these three aspects: She may be a servant, or housekeeper, expecting pecuniary compensation for services; or she may be a boarder, expecting to pay pecuniary compensation for accommodations and subsistence; or she may be a visitor, expecting neither to make, nor pay compensation. Perhaps it might be safe to consider the latter predicament as embracing the larger number of cases."[35]

[22] Hauser v. Sain, 74 N. C. 552. In this case the trial court charged the jury that the presumption to pay for services rendered, was not rebutted by the relations of the parties, which the supreme court sustained, basing its decision upon the general rule, that where services are rendered to a party and accepted, under no express contract, the law implies an agreement to pay therefor by the party receiving such services, saying there was no reason in the contention that the relations of the parties in the case rebutted this presumption, fully approving the dissenting opinion of Daniel, J., in Williams v. Barnes, 3 Dev. (N. C.) 348. See also Curry v. Curry, *supra*.

[23] Moyer's Appeal, 112 Pa. St. 290; S. C., 3 Atl. Rep. 811.

[24] Sawyer v. Hebard, 58 Vt. 375; S. C., 3 Atl. Rep. 529; King v. Kelly, 28 Ind. 89; Ryman v. Wright, 26 Ind. 207; Hall v. Finch, 29 Wis. 27; Danhenspeck v. Powers, 27 Ind. 42.

[25] Marriner v. Collins, 5 Harrington (Del.), 290.

[26] Oxford v. McFarland, 3 Ind. 156; Bonney v. Haydock (N. J.), 4 Atl. Rep. 766.

[27] 118 Ill. 292; S. C., 6 West. Rep. 217; S. C., 8 N. E. Rep. 315.

[28] Griffin v. Potter, 14 Wend. (N. Y.) 209; Livingston v. Ackerton, 5 Cow. (N. Y.) 531; Mountain v. Fisher, 22 Wis. 93, 96; Ryan v. Lynch, 9 Mo. App. 18.

[29] Windland v. Deeds, 44 Iowa, 98; Ryan v. Lynch, 9 Mo. App. 18.

[30] Hartman's Appeal, 3 Grant's Cas. (Pa.) 271.

[31] Smith v. Johnson, 45 Iowa, 308.

[32] Hayes v. McConnell, 42 Ind. 285; Resor v. Johnson, 1 Ind. 100; Adams v. Adams, 23 Ind. 50; Candor's Appeal, 5 Watts & S. (Pa.) 513; Guild v. Guild, 15 Pick. (Mass.) 129; Andrus v. Foster, 17 Vt. 556; Guenther v. Birkicht, 22 Mo. 439; Williams v. Barnes, 3 Dev. (N. C.) 348; Morton v. Rainey, 82 Ill. 215; Miller v. Miller, 16 Ill. 296. See cases in notes 11, 12, 13 and 14.

[33] In Andrus v. Foster, 17 Vt. 556, 560, plaintiff was a foster child of defendant, having been taken by the latter as a member of his family when a young child, and continued to live as before, after becoming of age. No recovery for services was allowed.

[34] 15 Pick. (Mass.) 129.

[35] But see the dissenting opinion of Daniels, J., in Williams v. Barnes, 3 Dev. (N. C.) 348, 351. This was an action by a son against his father for services, after he had attained his majority. Daniels, J., said. "There is a natural and legal obligation on the part of the parent to maintain his child during infancy. The law has fixed the time during which the child shall be

IV. *When Contract Created. — Express contracts* between members of the same family to make compensation for services, board, etc., will be enforced.[36] The presumption being against a contract, the law requires that when a promise is alleged to have been made, proof must be *direct, clear and positive.* Loose declarations made to others, or even to the claimant himself, will not answer. That which may be only an expression of intention is inadequate for the purpose. A legal obligation, capable of being enforced, must have been intended.[37] The ordinary expressions of gratitude for kindness to old age, weakness and suffering, are not to be tortured into such contracts.[38] Hence, under such circumstances, when a child claims to recover for services he must show an express contract by the father to pay such wages, either by direct or positive evidence of the fact or by circumstantial evidence equivalent to direct and positive.[39] But here, as in other cases, it is not essential that the details of the contract be agreed upon, as to the rate of wages or the time or mode of payment. When an express contract exists the child becomes a servant of his father and may recover *quantum meruit.*[40] A promise *quantum meruuit* is as binding upon the promisor as one which specifies the amount of compensation to be paid.[41]

A few illustrations will be given. Where plaintiff's mother-in-law, who was aged and infirm, requested him to take her to his house and care for her, which he did, boarding and nursing her until her death, she being helpless, and unable to perform any service during all the time, and it was shown that she expressed a desire to pay plaintiff for her care, it was held that she did not become a member of his family, and that he was entitled to recover the value of the services rendered by him and his family from her estate.[42] So, where one for a series of years supports his wife's mother as one of his own family, without any agreement for compensation until a few weeks prior to the mother's death, when he informs her that he will charge her at a certain weekly rate from the beginning, and she then promises to pay therefor, such a promise is without consideration, except as to such services and support as are rendered subsequent to the promise.[43] But the parol promise of a decedent to the mother of his niece that if she would let his niece stay with him and his wife, she (the niece) should have a good home as long as she lived, and at his death he would provide for her; that she should never want as long as she lived—if a contract, it is not capable of being enforced because its terms are hopelessly indefininite and uncertain as to length and amount of service, as well as to the compensation to be given.[44]

Under proper conditions, an express contract by father to child to convey property in consideration of services will be sustained,

considered an infant, to the period of twenty-one years. The parent, during this period, has a right to the services of the child to enable him to fulfill his obligations. But after the period of twenty-one years, the parent is released from his obligation, and the child is bound to maintain himself, and the law likewise releases the child from the obligation of giving his labor and services to the parent, because it then becomes necessary for him to use his industry for his own maintenance. Therefore, when he labors for the parent after the time he arrives at the age of twenty-one years, the law raises a promise by the parent to pay as much as the labor of the child is reasonably worth. The circumstances of the relationship of parent and child may go to the jury as evidence, with other facts and circumstances, to aid the defense of the parent, upon the question whether the labor of the child was gratuitous or not, but it does not operate as an exception to the rule of law." This language is fully approved in Hanser v. Sain, 74 N. C. 552, 556.

[36] Medsker v. Richardson, 72 Ind. 323; Wilson v. McMillan, 62 Ga. 16; Chadwick v. Devore, 69 Iowa, 637; s. c., 29 N. W. Rep. 757; Brown's Appeal, 112 Pa. St. 18; s. c., 5 Atl. Rep. 13.

[37] Hartman's Appeal, 3 Grant's Cas. (Pa.) 271, 276; Candor's Appeal, 5 Watts & Serg. (Pa.) 513.

[38] Bash v. Bash, 9 Pa. St. 262.

[39] Byrnes v. Clark, 57 Wis. 13, 21; Tyler v. Burrington, 39 Wis. 376; Wells v. Perkins, 43 Wis. 160; Titman v. Titman, 64 Pa. St. (14 Smith) 480.

[40] Byrnes v. Clark, 57 Wis. 13, 21; s. c., N. W. Rep. 815; Wells v. Perkins, 43 Wis. 160; Maunsean v. Mueller, 45 Wis. 430.

[41] Geary v. Geary, 67 Wis. 248; s. c., 30 N. W. Rep. 601, affirming Tyler v. Burrington, 39 Wis. 376.

[42] Wence v. Wykoff, 52 Iowa, 644; s. c., 3 N. W. Rep. 685, the court said: "When the family relation is shown not to have existed, the rule does not prevail, because the reason upon which it is based does not exist. Members of a family serve the head thereof without compensation, and receive support without returning remuneration, one who becomes a member of the family cannot, therefore, be charged for his support. But in order to become a member of a family he must assume and discharge duties usually incumbent upon the individuals of the family."

[43] Van Sandt v. Cramer, 60 Iowa, 424; s. c., N. W. Rep. 259;

[44] Wall's Appeal, 111 Pa. St. 460; s. c., 5 Atl. Rep. 220; Pollock v. Ray, 85 Pa. St. 428, and Graham v. Graham, 34 Pa. St. 475, followed.

though they live in the same family.[45] Yet where parol contracts to convey land by father to son are sought to be established the evidence must not only be direct, positive, express and unambiguous, but the contracting parties must have been brought face to face, the witnesses must have heard the bargain when it was made, or must have heard the parties repeat it in each other's presence. Every presumption is against the claimant in such a case.[46] Claims of this nature should receive the closest and most careful scrutiny.[47]

Implied contracts between members of a family to pay for services, board, etc., will also arise under certain circumstances. Thus, where deceased lived with his sister's family, where his washing and ironing was done, and where he was taken care of when sick, he never paid anything, but repeatedly said that he would pay for all that was done for him, and it did not appear that no return was expected, his estate was held liable upon implied assumpsit for services.[48] So, where a sister boarded with her brother at his boarding-house, with other boarders, with nothing to indicate that she was there as an invited guest, it was held that the relationship between the parties was not such as involved any duty to support, or negatived an implied contract to pay for the boarding furnished.[49] So, where a minor of eleven years is taken into the family of his uncle, and remains there until he is of age, receiving his board, clothing and medical attendance from his uncle, and after he becomes of age continues to reside with his uncle, but furnishes his own clothes and pays his own medical bills—these facts are sufficient to establish an implied contract on the part of the uncle to pay him what his services are reasonably worth.[50]

Under like circumstances, an implied contract for expenditures will arise. Thus, where a son lived with his father's family and expended money at his father's request, and with his knowledge and assent, in building a house for his father, the latter is liable, unless there appears to have been a different understanding between them—it being a question for the jury, in view of all the circumstances.[51]

EUGENE MCQUILLIN.

[45] Dowell v. Applegate, 15 Fed. Rep. (C. C. D. Oregon), 419; Collier v. French, 64 Iowa, 577; s. c., 21 N. W. Rep. 90; Howard v. Rynearson, 50 Mich. 307; 15 N. W. Rep. 486; Price v. Jones, 105 Ind. 543; 6 N. E. Rep. 683; Ackerman v. Fisher, 57 Pa. St. 457; Edwards v. Morgan, 100 Pa. St. 330; Miller's Appeal, 100 Pa. St. 568.

[46] Burgess v. Burgess, 109 Pa. St. 312, 316; s. c., 1 Atl. Rep. 167.

[47] Wall's Appeal, 111 Pa. St. 460; s. c., 5 Atl. Rep. 220.

[48] O'Connor v. Beckwith, 41 Mich. 657; s. c., 3 N. W. Rep. 166. See Ensey v. Hines, 30 Kan. 704, 707.

[49] Mayfaith's Appeal, 2 Atl. Rep. 28. See Miller's Appeal, 100 Pa. St. 568.

[50] Morton v. Rainey, 82 Ill. 215, 217. See Neale v. Engle (Pa.), 7 Atl. Rep. 60; Mountain v. Fisher, 22 Wis. 93.

[51] Hildebrands v. Nibbelink, 44 Mich. 413; s. c., 40 Mich. 646; s. c., 6 N. W. Rep. 861.

INDEMNITY — NOTICE — CONTRACT — JUDGMENT—EVIDENCE—DAMAGES.

DAVIS V. SMITH.

Supreme Judicial Court of Maine, April 14, 1887.

1. *Contract of Indemnity—Notice to Indemnitor to Defend Action Against Indemnitee—Judgment Conclusive.*—A judgment, without fraud or collusion, against one to whom another is responsible over either by operation of law or express contract will be conclusive against the latter whether he appears and defends or not, provided due notice is given him of the action and an opportunity to defend.

2. *Same—Sufficiency of Notice.*—A formal notice in writing is not necessary; it is sufficient that the indemnitor had knowledge and participated in the defense.

3. *Same—Action Against Indemnitor—Form of Action Optional.*—Where a contract of indemnity not under seal contains nothing more than the law would imply, it is optional for the party indemnified to declare in general *indebitatus assumpsit* or upon the special contract.

4. *Judgment—Evidence of—Entries.* — The docket entries are the only proper evidence of a judgment, where the record has not been fully extended.

5. *Action on Contract of Indemnity—Measure of Damages.*—The amount of the judgment and costs paid in good faith by the party indemnified is the measure of damages in this action.

FOSTER, J., delivered the opinion of the court: This action, brought upon a contract of indemnity, comes to this court upon a full report of the evidence, with the stipulation that the court is authorized to draw such inferences therefrom as a jury might legally do. It appears that the plaintiff, on January 24, 1871, gave his negotiable promissory note for $209 to Harrison Dorr, guardian of Rosetta Dorr, niece of the defendant, payable on the first day of January, 1874. The defendant had obtained letters of guardianship in

an adjoining county in which she resided, and with whom Rosetta was at that time living; and, soon after the note became due, represented to the plaintiff that she was the lawful guardian of Rosetta Dorr, and as such was legally authorized to collect said note, whereupon the plaintiff paid the defendant the sum of $231.21, the amount then estimated to be due upon the note. At the same time, and in consideration thereof, the defendant agreed in writing to fully indemnify and save the plaintiff harmless in consequence of his paying the note to her. Suit was afterwards commenced by the indorsee of the note. The case was tried and carried to the full court. Finally, judgment was rendered against this plaintiff for the amount of the note, and interest thereon from date. Dorr v. Davis, 76 Me. 301. After judgment was rendered against him this plaintiff paid the amount of it, together with costs of suit, to the plaintiff in that action, and now seeks to recover the sum thus paid, amounting to $479, from the defendant in this suit.

To entitle him to a recovery, he must show that some other person has established a better title to the money upon that note than the defendant herself had, and that he has been compelled to pay it to such person. This he may do in one of two ways: (1) By ordinary proof of an outstanding better title in such third person, to which he yielded and paid; (2) by a judgment against him by such third person, to which the defendant was party or privy, and which judgment he has been compelled to pay. Hall v. Thayer, 12 Metc. 136. The plaintiff does not base his claim upon the ordinary proof of an outstanding superior title in some third person to which he yielded and paid, but upon the recovery of a judgment against him, payment of the same, and for which the defendant was bound to indemnify and save him harmless. The defendant was not a party to the action upon which that judgment was rendered. *Prima facie* she was not bound by the judgment; and to make it evidence against her, and in favor of himself, the plaintiff must show that it was rendered against him in favor of the indorsee of the note, upon a transaction against which the defendant was bound to indemnify him. If such was the fact, it would be legitimate and competent evidence; otherwise it would not; and evidence *aliunde* is admissible for such purpose. Littleton v. Richardson, 34 N. H. 189.

From an examination of the evidence it is apparent that the cause of action in the other suit was the identical note which the defendant had induced the plaintiff to pay over to her, the amount of which she acknowledges she received from the plaintiff at the time of agreeing to indemnify him in consequence of such payment. With this connecting parol evidence, together with the copy of the declaration and of the note in question, as well as with what appears from the other evidence in the case, the identity of the cause of action in that suit was the subject-matter to which the indemnity relates is sufficiently established. Was the judgment therein rendered against this plaintiff conclusive against the defendant in this action? It was, provided she had due notice of the pendency of the action in which that judgment was rendered, and had an opportunity to defend it. The rule seems to be established that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not. Veazie v. Railroad Co., 49 Me. 124; Hardy v. Nelson, 27 Me. 530; Boston v. Worthington, 10 Gray, 498; Littleton v. Richardson, 34 N. H. 187.

We are of the opinion, from the evidence before us, and with the inferences legitimately to be drawn from it, that the defendant had such notice of the pendency of the suit as renders the judgment recovered therein conclusive against her. She employed and paid the counsel who tried the case. She went, in company with the plaintiff, twice to Dover to have the case tried; it being continued the first time because the other side was not ready. She was present at the trial, testified in the case, and paid all the expenses of this plaintiff and his witnesses. If the evidence reported is to be taken as true, she appears to have regarded the case as her own until the decision rendered from the law court. The facts shown are sufficient to render the judgment conclusive against her, although the plaintiff had not in terms requested her to take upon herself the defense of that action. "This was not necessary," say the court, in Boston v. Worthington, *supra*, "to render the judgment conclusive against them as to the facts thereby established." And this principle is established by the great weight of authority, that, where one stands in the position of indemnitor to another who is liable over to a third party, his liability may be fixed and determined in the action brought against such third party by notice of the pendency of such action, and an opportunity afforded him to defend it. Aberdeen v. Blackmar, 6 Hill, 324; City of Chicago v. Robbins, 2 Black, 423. In such case the authorities hold that notice in writing, or even express notice, is unnecessary, but that notice may be implied from his knowledge of the pendency of the action, and a participation in its defense. City of Chicago v. Robbins, *supra;* Robbins v. City of Chicago, 4 Wall. 657; Port Jervis v. Bank, 96 N. Y. 557; Barney v. Dewey, 13 Johns. 226; Beers v. Pinney, 12 Wend. 309; Warner v. McGary, 4 Vt. 508; Boston v. Worthington, *supra;* Chamberlain v. Preble, 11 Allen, 374; Veazie v. Railroad Co., 40 Me. 119,

120. "It cannot be material to the person agreeing to indemnify that he should have a formal notice served upon him. The law requires that he should have notice before the judgment can be used against him, because he is the real party in interest. But any notice which will enable him to present any defense which he may have either in law or in fact is all that can be useful to him, and the law requires no vain or useless ceremonies in such cases." Holbrook v. Holbrook, 15 Me. 12. In such case the judgment binds the party whose duty it is to indemnify, and becomes legitimate evidence in favor of the plaintiff and against the defendant. Train v. Gold, 5 Pick. 379; Kip v. Brigham, 6 Johns. 159; Ryerson v. Chapman, 66 Me. 563.

But the defendant contends that there is no sufficient legal evidence introduced of any judgment such as the plaintiff has alleged in the several counts of his writ; that there is a fatal variance between the allegations and the proof, and consequently the plaintiff is not entitled to recover. At the time the order for judgment was sent down from the law court an entry was made upon the docket of the county where the action was pending for hearing in costs by the defendant. No vouchers have ever been filed by the plaintiff in that action, and no hearing had by the defendant therein in relation to costs. Consequently no extended record of the judgment has ever been made, as appears from the testimony of the clerk. True, a record was commenced, but it was never completed. That portion of the record which the clerk had commenced, a copy of which was introduced, shows affirmatively that it is incomplete, never having been made up and attested by the clerk. When the record is once made up, however, it becomes conclusive upon all parties until altered or set aside by a court of competent jurisdiction, and the statements contained in it must be regarded as importing absolute verity, and not subject to explanation or contradiction by any evidence outside of such record. But until the record is in fact fully extended it is well settled that the docket is the record, and the entries therein are the only proper evidence of the judgment. Willard v. Whitney, 49 Me. 238; Leathers v. Cooley, *Id.* 342.

The fact that there may be no fully extended record does not affect the judgment. That is the principal thing; the record is only evidence of it. Here the certified copies of the docket entries were introduced, and they show that judgment was rendered against this plaintiff for the sum of $209, with interest from January 24, 1871, the full amount of the note "as per certificate from clerk of law court received and filed June 10, 1884." By Rev. Stat. ch. 77, § 45, it became the duty of the clerk to "enter judgment as of the preceding term," and the judgment, when entered up, should have been as of the February term preceding. "But for most purposes," remarks Barrows, J., in Huntress v. Hurd, 72 Me. 454, "the order of the law court to the clerk of the supreme judicial court to enter up judgment, or directing such a disposition of all pending questions as leaves nothing to be done but to make up the judgment, must be deemed a judgment. For all purposes, when it is necessary in order to sustain legal and equitable rights, the court so regards it."

Were this an action of debt brought upon the judgment itself, it would necessarily be against the party defendant therein named, and the plaintiff might therefore meet with serious difficulty in the introduction of a judgment in evidence in support of his allegations, differing so widely as to the time of its rendition from the time alleged in the first three counts of the plaintiff's writ, viz., June 9, 1884. But the basis of the plaintiff's claim is *assumpsit* and not debt. It is founded on a promise of indemnity, and not on a contract of record. His claim is to recover in *assumpsit* for the money which he has been compelled to pay by force of that judgment. In addition to the special counts in his writ, he has declared upon the general count for money paid, and we think he is entitled to maintain this action under that count. The judgment, therefore, becomes admissible and competent evidence between these parties. Hardy v. Nelson, 27 Me. 530; Holbrook v. Holbrook, 15 Me. 11.

Nor do we think that the objection of the defendant is tenable, that, there being a written contract of indemnity, the plaintiff must declare specially upon such contract, and will not be allowed to introduce proof in support of his claim under the general count for money paid. The objection is one of form, and does not touch the real merits of the case. Still, if it rests on sound legal principles, it is the duty of the court to give effect to it. It is undoubtedly the general rule of law that, where the parties have made an express contract, the law will not imply one. But this rule is not inflexible, and, like most general rules, is subject to exceptions. Thus it has been held that, where the special contract is not under seal, the plaintiff has his option, under some circumstances, either to declare on the implied promise, or to set out the special contract in his declaration. Tousey v. Preston, 1 Conn. 175. An action for money had and received will lie on a promissory note or bill of exchange, and yet they are express contracts. Pitkin v. Frink, 8 Metc. 12; Henschel v. Mahler, 3 Denio, 428. It is also a reasonable and well-recognized principle of law, settled by numerous decided cases, that where there is an express contract of indemnity, and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in general *indebitatus assumpsit* for money paid, or upon the special contract.

This question arose in Gibbs v. Bryant, 1 Pick. 118, where a written promise of indemnity had been given to the plaintiff by the defendant; and, upon objection by the defendant that there was a special agreement which ought to have been declared on, the court say: "This objection cannot

avail the defendant because the written contract produced contained nothing more than what the law would imply. The right of action rests upon the payment of money for the use of the defendant. The law raises a promise, and the plaintiff may make use of his written contract or not, as he pleases. If there is anything in the written promise to contradict the implication of law, the defendant may show it." Precisely the same doctrine was laid down in Sanborn v. Emerson, 12 N. H. 58, where the declaration contained a general count for money paid, laid out, and expended for the use of the defendant. There the plaintiff had receipted the property of the defendant attached in sundry suits commenced against him, and had the actual custody of it, and at the request of the defendant the plaintiff delivered the property to him; the defendant expressly agreeing that the plaintiff should be indemnified and saved harmless on account of the obligation resting upon him in consequence of his having receipted for the property attached. Judgments were afterwards recovered in the several suits; and the plaintiff, being unable to surrender the property, was compelled to pay the amount of the several judgments. The court there say that the case comes "directly within the principle of the decision in Gibbs v. Bryant; the special contract, as it appears, containing nothing more than the law would imply. On this branch of the case, then, we hold that the action is well maintained, notwithstanding the existence of the special contract of indemnity, and the omission to set it out in the declaration; and the objection that the action should have been brought on the express contract is therefore overruled." The following cases sustain the same principle: Colburn v. Pomeroy, 44 N. H. 23; Rushworth v. Moore, 36 N. H. 195; White v. Leroux, 1 Moody & M. 347, 22 E. C. L. 331; Williamson v. Henley, 6 Bing. 299, 19 E. C. L. 89; Pownal v. Ferrand, 6 Barn. & C. 439, 13 E. C. L. 232, 233; Keyes v. Stone, 5 Mass. 394. The relation of the present parties in reference to the note upon which the indemnity was given, was such as would in law raise an implied duty or obligation of indemnity as strong as where a receiptor, upon request, had delivered up property to the owner against whom suits had been commenced. The defendant in the one case had no right to the property; in the other, no right to the money or note; and the contract of indemnity in both cases contained no more than the law would imply.

The plaintiff alleges that he has paid so much money for the use of the defendant. To sustain this allegation it is necessary for him to show that the money was paid at the defendant's request, either express or implied. "The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. * * * In every case, therefore, in which there has been a payment of money by the plaintiff to a third party at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable." Brittain v. Lloyd, 14 Mees. & W. 773. And the doctrine of the courts is that where the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, has paid money which the defendant ought to have paid, this count will be sustained. 2 Greenl. Ev. § 114; Nichols v. Bucknam, 117 Mass. 491. In such case, said Lord Tenterden, C. J.: "I am of the opinion that he is entitled to recover upon the general principle that one man who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it." Pownal v. Ferrand, 6 Barn. & C. 439, 13 E. C. L. 231.

The only remaining question relates to the measure of damages under the particular facts and circumstances of this case. What is the defendant's liability under this branch of the case? She was notified of the pendency of the action against this plaintiff in which the title to the note in question and the validity of the payment to her were put in issue. She appeared, and participated in the defense, and has paid the counsel fees. It was her duty thus to appear, and, if possible, save this plaintiff harmless on account of his paying, upon her representations, the note to her when in fact she had neither the legal title to it, nor the lawful right to the money upon it. Judgment being rendered against this plaintiff, the defendant was called upon and requested by him to settle the same, and this she refused to do. After such refusal the plaintiff was not obliged to wait until his property was seized on execution issued upon that judgment before being authorized in law to pay the same. The amount he paid to relieve himself from the judgment against him, as appears by the evidence, was no more than the judgment rendered and costs legally taxable against him in that suit and incident to that judgment. This the plaintiff has paid in good faith. He is entitled to recover it as the measure of his damages. Coolidge v. Brigham, 5 Metc. 72; Boston & A. R. Co. v. Richardson, 135 Mass. 477; Ryerson v. Chapman, 66 Me. 562; Kingsbury v. Smith, 13 N. H. 125; Veazie v. Penobscot R. Co., 49 Me. 127.

Judgment for plaintiff for $479, and interest thereon from the date of the writ.

NOTE.—The general rule is well settled in accordance with the principal opinion, that where one has executed a bond or contract of indemnity to another who is liable over to a third person, the party so indemnified may, by giving notice to the indemnitor to appear and defend the action brought against him by such third person, fix the liability of the indemnitor, who will be concluded by the judgment whether he

appears or not.[1] Thus where a sheriff, who had taken a bond for the liberties of the goal granted a prisoner, was sued for an escape and judgment recovered against him, and gave notice to the sureties who assisted in his defense, it was held, in an action by him on the bond, that the recovery in the former suit was conclusive evidence.[2] So, where a judgment creditor gives a bond to indemnify an officer to sell property on execution, which is claimed as exempt by the debtor, a judgment recovered by the debtor against the officer for the value of the property sold, in an action of which the creditor was given due notice and an opportunity to defend, is conclusive in an action on the bond.[3]

Where the responsibility over is fixed by law instead of express contract, the same rule may be applied. Thus, where a city has given due notice to the wrong-doer of an action brought against it for damages for an injury caused by an obstruction, and that it will hold him liable to indemnify against any recovery therein, the judgment against it will be conclusive in its action against him, if it is shown that he unlawfully created or negligently left the obstruction, both as to the liability of the city to the injured person, and as to any matter that might have been urged as a defense, such, for instance, as contributory negligence.[4]

This practice may also be pursued with advantage by a grantee against whom an action of ejectment is brought. By notifying his grantor, where he holds under covenants of warranty, to appear and defend, he can have the latter's liability determined in that action. Upon failure of the grantor to appear after receiving such notice, the judgment therein, if any be rendered against the grantee, becomes conclusive, not only in favor of the plaintiff in that action, but also in favor of the grantee when the latter sets up the paramount title by which he was evicted in an action against the grantor on his covenant of warranty.[5] And it is held that the covenantee, after giving proper notice, is not bound to further defend such action, and a judgment by default, in the absence of fraud or collusion, will be conclusive against the covenantor.[6]

So, where the covenantor has been properly notified by the covenantee, and has appeared to the action, but has died before judgment, it has been held that his representatives are bound by the judgment.[7]

There is some conflict in the authorities as to whether formal notice, expressly requiring the covenantor or indemnitor to defend, can be waived and the same result attained by mere knowledge of the action, or even by an appearance thereto, or a taking part therein by the indemitor or covenantor. But, upon principle, it would seem that ,where he has knowledge and participates in the defense, at least the judgments ought to be conclusive against him. In the case of Morgan v. Muldoon, it is said: "Where the covenantor has paid costs and made admissions of record upon his oath, has appeared, taken upon himself the defense and pleaded by attorney, and has obtained a continuance, as in this case, it may be presumed that he was properly notified, or it may be said that for himself and for his estate he waived notice. The purpose of formal notice was accomplished."[8]

A similar opinion is expressed by Graves, J., in a case recently decided by the Supreme Court of Michigan.[9] So it has often been held as against an indemnitor, as will be seen from the authorities cited in the principal opinion, as well as those cited in the note below, that a formal notice in express terms to defend is unnecessary, and that direct notice from the indemnitee in any form may be waived by knowledge and participation in the defense.[10] On the other hand, it has been held that knowledge of the action and notice to attend the trial, without an unequivocal request from the warrantee to the warrantor to defend, is not enough to work an estoppel.[11]

The measure of damages may also often be fixed by notice. Thus where a surety is sued on his undertaking, it has been held that he is not bound to pay it to save costs, unless he is expressly notified that the principal has no defense, and if the demand is liquidated he need make no defense in order to entitle him to recover from his indemnitor the costs paid on the default.[12] Where the demand is unliquidated the defendant may give notice to his indemnitor and not defend unless directed to do so, or he may, after giving notice, use his best judgment in the matter, and if the facts seem to warrant his defense, hold the indemnitor liable for the costs of the suit, in addition to the amount of the judgment recovered against him.[13] In the case of Westfield v. Mayo, the Supreme Court of Massachusetts held that counsel fees, incurred by a city in defending an action against it for damages for an injury caused by an obstruction wrongfully created by the defendant, might be recovered as part of the expenses of the former suit. After mature deliberation the court announced the following rule, which secures well founded in reason: "When a party is called upon to defend a suit founded upon a wrong, for which he is held responsible in law without misfeasance on his part, but because of the wrongful act of another, against whom he has a remedy over, counsel fees are the natural and reasonably necessary consequences of the wrongful act of the other, if he has notified the other to appear and defend the suit. When, however, the claim against him is upon his own contract, or for his own misfeasance, though he may have a remedy against another and the damages recoverable may be

1 Beers v. Pinney, 12 Wend. 309; Mayor of Troy v. Troy, etc. R. Co., 49 N. Y. 657; Aberdeen v. Blackmar, 6 Hill, 324; Thrasher v. Haines, 2 N. H. 443, and authorities cited. And see Heiser v. Hatch, 86 N. Y. 614; City of Brooklyn v. Brooklyn R. Co., 47 N. Y. 475; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275; Buisse v. Wood, 37 N. Y. 530.

2 Kip v. Brigham, 6 Johns. R. 158.

3 Miller v. Rhoades, 20 Ohio St. 494. And see Freeman on Judgments, § 184, and additional authorities there cited.

4 City of Rochester v. Montgomery, 72 N. Y. 66. To same effect, Village of Port Jervis v. First Nat. Bank, 96 N. Y. 550; Westfield v. Mayo, 122 Mass. 100; s. c., 23 Am. Rep. 292; 2 Dillon Munic. Corp. (3d ed.) § 1035; City of Elkhart v. Wickwire, 87 Ind. 78.

5 Miner v. Clark, 15 Wend. 425; Greenlow v. Williams, 2 Lea, 533; Rawle on Covenants, 218; Hamilton v. Cutts, 4 Mass. 349.

6 Morgan v. Muldoon, 82 Ind. 347; Jackson v. Marsh, 5 Wend. 44.

7 Brown v. Taylor, 13 Vt. 631.

8 Morgan v. Muldoon, 82 Ind. 347, 353.

9 Mason v. Kellogg, 38 Mich. 132.

10 Chamberlain v. Preble, 93 Mass. 373; Heizer v. Hatch, 86 N. Y. 614; Freeman on Judgments, § 181.

11 Somers v. Schmidt, 24 Wis. 417; s. c., 1 Am. Rep. 191; Paul v. Whitmore, 3 Watts & Serg. 410.

12 Baker v. Martin, 3 Barb. 634; Hulett v. Soullard, 26 Vt. 295; Colter v. Morgan, 12 B. Mon. (Ky.) 278; Wade on Notice (2d ed.), § 480m.

13 Westfield v. Mayo, 122 Mass. 100; Duebury v. Vermont, etc. R. Co., 26 Vt. 751; Dubois v. Hermance, 56 N. Y. 673.

the same as the amount of the judgment recovered against himself, counsel fees paid in defense of the suit against himself are not recoverable."[14].

W. F. ELLIOTT.

[14] Westfield v. Mayo, 122 Mass. 100; s. c., 23 Am. Rep. 292, 294. And see 2 Dillon Munic. Corp. (3d ed.) § 1035, note 2.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ABATEMENT—Death—Infancy.——Where a defendant in ejectment dies, and the guardian of his minor children asks for the continuance of the case during their infancy, a demurrer to the answer should, under Maryland law, be overruled.—*Tise v. Shaw*, Md. Ct. App., Nov. 18, 1887; 11 Atl. Rep. 363.

2. ACCORD AND SATISFACTION—Property.——Where a creditor accepts property in satisfaction of his debt, which is valued by the parties at less than the debt, the rule, that partial payment is no consideration for the release of the whole debt, does not apply.—*Hasted v. Dodge*, S. C. Iowa, Dec. 13, 1887; 35 N. W. Rep. 463.

3. ACTIONS — Joinder — Jurisdiction.——In an action for damages for wrongfully obtaining an injunction, the sureties on the bond and the instigator of the proceedings may be joined, though some are sued *ex contractu* and others *ex delicto*, reserving their right of severance in their defenses. Whenever the court notices its lack of jurisdiction *ratione materiæ*, it must rectify its error.—*Riggs v. Bell*, S. C. La., Nov. 21, 1887; 3 South. Rep. 183.

4. APPEAL — Amendment—Stipulation.——Where, in a trial court, an amended declaration is filed by stipulation of parties, and that declaration is omitted in the transcript, there being no order for it in the trial court, the appellate court cannot act upon such amended declaration.—*People use, etc. v. Illinois, etc. Co.*, S. C. Ill., Nov. 8, 1887; 14 N. E. Rep. 261.

5. APPEAL—Assignment of Error. —— Where, on a rule to distribute money, the court fixes the order of payment, but gives no reason, and the record shows no ruling on any question of law or fact, the assignment of error need not be more specific.—*Holst v. Burrus*, S. C. Ga., May 2, 1887; 4 S. E. Rep. 108.

6. APPEAL — Assignment of Errors—Master and Servant—Negligence.——An assignment of common errors refers only to errors in the record. A master is liable for the negligence of his servant in leaving obstructions on the sidewalk by which plaintiff was injured.—*Driscoll v. Carlin*, S. C. N. J., Nov. 26, 1887; 11 Atl. Rep. 482.

7. APPEAL—Bill of Exceptions—Certificate.——Where the bill of exceptions is only certified to by the court reporter, it will not be regarded and the judgment will be affirmed.—*Independent School District v. Farmer*, S. C. Iowa, Dec. 9, 1887; 35 N. W. Rep. 450.

8. APPEAL—Certificate of Division.——Questions certified upon division of opinion between the judges must be distinct propositions of law, capable of being answered, regardless of other issues of law or of fact in the case.—*Jewell v. Knight*, U. S. S. C., Dec. 6, 1887; 8 S. C. Rep. 193.

9. APPEAL — Certificate of Division. —— Where the record certified upon division of opinion between the judges consists of a statement of facts in the nature of evidence, the appeal will be dismissed.—*Smith v. Craft*, U. S. S. C., Dec. 5, 1887; 8 S. C. Rep. 196.

10. APPEAL—Interlocutory Decree.——An appeal will not lie from an interlocutory decree unless its enforcement would work an irreparable injury. — *Winter v. Frankel*, S. C. La., Dec. 5, 1887; 3 South. Rep. 226.

11. APPEAL — Lawsuit — Cross-bill. —— When, in an action at law the defendant files a cross-bill in equity, errors in proceedings on the cross-bill cannot be reviewed on appeal from the judgment in the law case.—*Oatman v. Epps*, S. C. Oreg., Nov. 23, 1887; 15 Pac. Rep. 709.

12. APPEAL—Notice.——Where the notice of an order and its entry fails to show the office or place of business of the attorney serving it, the time of appeal cannot be limited by the notice.—*Fortsmann v. Schulting*, N. Y. Ct. App., Oct. 25, 1887; 14 N. E. Rep. 190.

13. APPEAL—Parties—Injunction.——Where, in a case involving two mortgages, which were ordered closed, one of the mortgagees appealed, on the question of priority and the case was reversed, the court also stating that the appeal as to the mortgagors was not well taken, a new trial as to the mortgagors will be restrained.—*Little v. Superior Court*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 731.

14. APPEAL — Rehearing.——In Indiana, on appeal a rehearing must be applied for by a petition in writing in which must be stated the grounds on which the judgment is charged to be erroneous.—*Fertich v. Michener*, S. C. Ind., Nov. 5, 1887; 14 N. E. Rep. 68.

15. APPEAL — Rehearing — Execution. —— All judgments of the supreme court, including those on remedial writs, may be revised upon application for a rehearing within time allowed, and an execution issued before that time is irregular, but becomes valid after that time, and a party is not liable in damages for issuing an execution before that time.—*Regan v. Washburn*, S. C. La., Nov. 21, 1887; 3 South. Rep. 178.

16. APPEAL—Suspensive Appeal—Bond.——A bond to secure all costs is sufficient on a suspensive appeal.—*State ex rel. v. Duffel*, S. C. La., Dec. 5, 1887; 3 South. Rep. 231.

17. APPEAL—Time of Taking—Auditor—Statute.——Construction of Pennsylvania statutes regulating auditor's reports, the time of filing them, and the time of taking appeals therefrom.—*Township of Shippen v. Burlingame*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 547.

18. APPEAL—Weight of Evidence.——The dismissal of a divorce suit will be sustained, when there is not a clear preponderance of evidence to the contrary.—*Slater a. Slater*, S. C. Iowa, Dec. 7, 1887; 35 N. W. Rep. 439.

19. ASSIGNMENT — Creditor — Assignee—Duty of.——Where litigation occurs between the creditors of an insolvent company and the stockholders and the assignee thereof, the assignee cannot recover against the stockholders for alleged fraud on the ground that he is the agent of the creditors, as he is the agent of the corporation which made the assignment to him.—*Bouton v. Dement*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 62.

20. ASSIGNMENT FOR CREDITORS—Another State.——An assignment for the benefit of creditors, when properly recorded, takes effect from its date and passes the title to property in another State.—*Smith's Appeal*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 394.

21. ASSIGNMENT — Mortgage—Partnership.——Where one partner sold his intetest in the real estate of the firm and took a mortgage to secure the purchase money and subsequently the firm became insolvent and its assignee conveyed the real estate: *Held*, that the mortgage of the partner was entitled to priority of payment as against the grantee of the assignee. — *McConihe v. Fales*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 285.

22. ASSUMPSIT — Privity— Guardian. —— Assumpsit will lie for money had and received by the defendant from the plaintiff guardian who had held it as pension money for plaintiff's use.—*Pugh v. Powell*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 570.

23. BAILMENT—Right to Purchase — Creditors. ——A contract whereby A leases personal property to B at so much a month with a privilege of purchase, in which case the rent is credited on account, is a contract of hiring. One who purchases the property at a sale on an execution against B, without knowledge of A's contract, obtains the title, if the contract has not been recorded, under the act of 1882. — *Ludden, etc. House v. Dukenberry*, S. C. S. Car., Nov. 25, 1887; 4 S. E. Rep. 60.

24. BANKS—Reduction of Capital.——When a national bank has reduced its capital stock by a surrender of a proper proportion of stock by the stockholders, and has placed certain assets in its suspended debt from which a sum of money has been realized, a stockholder cannot compel a distribution of that money.—*McCan v. First Nat. Bank of Jeffersonville*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 251.

25. BANKRUPTCY — Assignee — Statute of Limitation. ——An assignee in bankruptcy must, under the United States Rev. Stat. § 5057, bring his action against persons holding property adversely to him within two years after his appointment as assignee.—*Ruff's Appeal*, S. C. Penn., Oct. 24, 1887; 11 Atl. Rep. 553.

26. BASTARDY — Maintenance — Limitation. —— Proceedings to compel a father to provide maintenance for his bastard child are not limited to two years, but the duty is a continuing one.—*State v. Laughlin*, S. C. Iowa, Dec. 9, 1887; 35 N. W. Rep. 448.

27. BILLS AND NOTES—Conditional Delivery.——In a suit on a negotiable note between the original parties, parol evidence is admissible to prove that it was to become operative only on the happening of a future event, as its execution by some other person.—*Merchants' etc. Bank v. Lucknow*, S. C. Minn , Dec. 13, 1887; 35 N. W. Rep. 434.

28. BONDS — Equity —Jurisdiction.——Where an officer defaults during his first term settles satisfactory at its close, is re-elected and defaults again during his second term, a court of equity has no jurisdiction to require the securities on the first bond and those on the second, to interplead as to their respective liabilities. The remedy is an action at law.—*Board, etc. v. Alford*, S. C. Miss., Dec. 5, 1887; 3 South. Rep. 246.

29. BUILDING ASSOCIATION — By-laws — Fines.——A building association, under the laws of Pennsylvania, can only impose fines by virtue of its by-laws enacted for that purpose. The validity of such by-laws depends upon whether they are reasonable or not.—*Lynn v. Freemanburg, etc. Ass'n*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 537.

30. CARRIER—Connecting Carrier—Warehouseman.——Where a carrier receives goods and makes a contract with a connecting carrier and with a warehouseman for the transportation and storage of the goods, he is not the agent of the shipper in such a sense as to authorize a contract that would relieve any of the parties from liability for loss by their negligence.—*Merchant's Ass'n v. Wood*, S. C. Miss., Dec. 5, 1887; 3 South. Rep. 248.

31. CARRIER — Negligence —Contract.——A common carrier may, by contract, restrict its liability, except against its own negligence.—*Hutchinson v. Chicago, etc. R. Co.*, S. C. Minn., Dec. 13, 1887; 35 N. W. Rep. 433.

32. CARRIER — Passenger—Protection. — A railroad company is bound to protect its passengers against injury by outside parties, by the exercise of the utmost care, skill and vigilance.—*Chicago, etc. Co. v. Pillsbury*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 22.

33. CERTIORARI — Mortgage — Executor. ——In California, the writ of *certiorari* is not allowable to review an order of the superior court allowing an executor to mortgage his decedent's estate.—*Graham v. Superior Court*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 746.

34. CERTIORARI —Ordinances—Validity.——A writ of *certiorari* will be refused when there is no complaint of the legality of the ordinance violated, nor of the regularity of the judgment, nor anything showing that the charge preferred is not an offense against said ordinance.—*State v. Davey*, S. C. La., Nov. 21, 1887; 3 South. Rep. 181.

35. CHATTEL MORTGAGE—Description of Property.——A chattel mortgage, conveying "property used in the business," is held to include a horse, harness and sleigh, which the mortgagor was accustomed to use in carrying on that business.—*Arnett v. Trimmer*, N. J. Ct. Chan., Dec. 13, 1887; 11 Atl. Rep. 487.

36. CHATTEL MORTGAGE — Record — Statute. —— In Indiana, a chattel mortgage must be recorded within ten days after its execution; hence, such a mortgage executed on the 18th of the month but not recorded until the 1st of the next month is void as against a subsequent purchaser.—*Briggs v. Fleming*, S. C. Ind., Nov. 19, 1887; 14 N. E. Rep. 86.

37. CHATTEL MORTGAGE—Sales by Mortgagor.——A mortgage of a stock of goods, with a stipulation that the mortgagee may take possession on default, implies that the mortgagor may retain possession, and power to sell in the meantime is a necessary inference, rendering the mortgage void as to creditors, though the proceeds were to go to the mortgagee.—*Owens v. Hobbie*, S. C. Ala., July 27, 1887; 3 South. Rep. 145.

38. CONSTITUTIONAL LAW — Boroughs. ——Construction of Pennsylvania statutes relating to incorporation of towns and boroughs. An ordinance of a borough forbidding the erection of wooden buildings within prescribed limits, *held*, constitutional.—*Klinger v. Ricket*, S. C. Penn., Oct. 31, 1887; 11 Atl. Rep. 555.

39. CHARITIES — Charitable Uses—Statute.——A donation to build churches for the use of the poor of a city is a charitable use, under the laws of Louisiana.—*Succession of Auch*, S. C. La., Dec. 5, 1887; 3 South. Rep. 227.

40. CONSTITUTIONAL LAW—Counsel.——A court cannot deny to a party in a suit the privilege of being heard by counsel.—*Stewart v. Com.*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 370.

41. CONTRACT—Consideration—Release.——Where an executor was about to sell land, an agreement was made between an heir who had a claim on the land and the widow, by which she agreed to reduce her claim

$200 and he to join in the deed: *Held*, that the removal of the cloud on the title was a sufficient consideration for the contract.—*Woodburn v. Woodburn*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 58.

42. CONTRACT—Writing—Parol Evidence.——A written agreement may be modified, explained or set aside by a parol undertaking made at the time, matter to the subject-matter of the contract by one party, which induced the other to sign the written contract, but the evidence must be clear, precise and indubitable.—*Thudium v. Yost*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 436.

43. CORPORATIONS — Regulation — Consolidation.—— Under the act of 1841 and the constitution of 1868, the legislature has unlimited power to amend the charter of a corporation, provided it does not go beyond regulation, supervision and control. The rights of a corporation formed by consolidating others depend upon the laws then in force and the act authorizing it.—*Charlotte, etc. R. Co. v. Gibbes*, S. C. S. Car., Oct. 18, 1887; 4 S. E. Rep. 49.

44. COSTS—Non-resident—Harmless Error.——A refusal by the court to require security for costs from a non-resident plaintiff, is, on appeal by the defendant from a judgment for the plaintiff, a harmless error.—*Walker v. Russell*, S. C. Iowa, Dec. 8, 1887; 35 N. W. Rep. 443.

45. COURTS —Federal—State Practice.——A stay of execution upon a judgment upon giving a bond and a subsequent issuing of an execution against the sureties thereon by the clerk of the United States court, in accordance with State practice, prior to the adoption of that law by the United States court, is void.—*Lamaster v. Keeler*, U. S. S. C., Dec. 5, 1887; 8 S. C. Rep. 197.

46. CRIMINAL LAW — Adultery — Rape—Sentence.—— One can be convicted of adultery, though he was also guilty of rape. Evidence of the moral character of the defendant is competent to guide the court in the sentence to be imposed.—*State v. Summers*, S. C. N. Car., Nov. 28, 1887; 4 S. E. Rep. 120.

47. CRIMINAL LAW—Burglary—Stolen Goods.—Where a burglary and a larceny were committed together, and soon after the stolen goods are found in a party's possession, this is *prima facie* evidence that he is guilty of both offenses.—*State v. Frahn*, S. C. Iowa, Dec. 9, 1887; 35 N. W. Rep. 451.

48. CRIMINAL LAW — Confession—Menace.——Where the prisoner was told that she must tell what she had done with her child, and that if she could not show what she had done with it they would get after her about it, her confession then made it inadmissible.—*State v. Crowson*, S. C. N. Car., Dec. 12, 1887; 4 S. E. Rep. 143.

49. CRIMINAL LAW — Embezzlement—Deposit Slips—Letter-press—Attorney.—— Deposit slips made by the defendant and used by the bank in making its entries, are admissible in embezzlement proceedings to prove that defendant properly accounted for the money. Letter-press copies of his letters are not admissible against him without evidence that the originals cannot be procured. An attorney, who appeared for the defendant at the original examination, when the defendant was discharged, cannot appear for the State at the trial.—*State v. Halstead*, S. C. Iowa, Dec. 12, 1887; 35 N. W. Rep. 457.

50. CRIMINAL LAW — Indictment — Intent — Exception. ——Where the statute is silent as to intent, it is not necessary to allege intent in the indictment, nor in an indictment for illegal practice of medicine is it necessary to negative the exception made in the law.—*Harding v. People*, S. C. Colo., Nov. 11, 1887; 15 Pac. Rep. 727.

51. CRIMINAL PRACTICE — Confessions — Admissibility. ——The court should ascertain, by evidence heard apart from the jury, whether the confession offered was voluntarily made, and, if in doubt, should exclude it. If admitted, the same evidence may also be offered to the jury, and if at any time during the trial it appears that the confession is inadmissible, it should be excluded.—*Ellis v. State*, S. C. Miss., Nov. 14, 1887; 3 South. Rep. 188.

52. CRIMINAL PRACTICE — Indictment — Election of Counts—Evidence.——Where the prosecution in an indictment, which contains three counts, elects to go to trial on the second and third only, evidence which is applicable only to the first count is inadmissible and should be excluded.—*Quinn v. Commonwealth*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 531.

53. CRIMINAL PRACTICE — Separate Offenses—Verdict. —— A general verdict of guilty is not proper, when in one count the indictment is for larceny of a horse and in the second for receiving the same horse knowing him to have been stolen.—*State v. Goings*, S. C. N. Car., Nov. 28, 1887; 4 S. E. Rep. 121.

54. DESCENT — Alimony — Guardian and Ward.—— Where, in Louisiana, a person is ordered to pay for what is there called alimony for the support of an infant, and is unable to do so, the court may order such person to receive into his or her family the infant.—*Schmidt v. Schmidt*, S. C. La., Nov. 21, 1887; 3 South. Rep. 225.

55. DRAINAGE—Assessment—Constitutional Law.—— Construction of Indiana statutes relative to drainage and assessments therefor. Those statutes *held* to be constitutional.—*Trimble v. McGee*, S. C. Ind., Nov. 19, 1887; 14 N. E. Rep. 83.

56. DEED—Covenant of Seizin—Conflict of Laws.—— Whether a deed executed in Indiana, conveying land in Missouri, contains the covenant of seizin, is determined by the law of the former State.—*Jackson v. Green*, S. C. Ind., Nov. 28, 1887; 14 N. E. Rep. 89.

57. DOWER—Eminent Domain—Recovery.——Where a borough has taken a lot by right of eminent domain and settled with the owner, paying no attention to a dower interest charged on the land, the remedy of the dowress is an action of debt against the borough.—*Borough of York v. Welsh*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 330.

58. DEED—Mistake — Cloud Upon Title—Equity.—— Circumstances stated under which a mistake in the description of property conveyed in a deed will not be corrected by a court of equity; the rights of third parties having intervened, it cannot be rectified as a cloud upon the title.—*Yeck v. Crum*, S. C. Ill., Sep. 27, 1887; 14 N. E. Rep. 3.

59. DEEDS—Remainder—Per Stirpes.—— A deed in trust for A, and after her death to her issue to take *per stirpes*, vests a remainder in the issue then living, opening to let in other issue at their birth, and the grandchildren, in case of death of issue, take *per stirpes*.—*Gourdin v. Deas*, S. C. S. Car., Nov. 28, 1887; 4 S. E. Rep. 64.

60. DRAINAGE—Statute — Jury—Appeal.——Construction of the Illinois statute relative to drainage. A party appealing from a decision rendered under this act is entitled to jury trial.—*Mascall v. Drainage Commrs., etc.*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 47.

61. DEED — Witness — Acknowledgment — Equitable Title.——A deed without subscribing witness or acknowledgment, given to a widow for a release of dower, creates an equitable title which will not be set aside in favor of the vendor, whose claim is founded on subsequent execution sales, in cases in which the vendee was not a party.—*Caperton v. Hall*, S. C. Ala., Dec. 15, 1887; 3 South. Rep. 234.

62. EXECUTORS—Accounting—Exceptions.——An accounting may be demanded from an executor so long as he fails to render it. Exceptions are aids to the court, but a jury cannot be demanded on them.—*In re Sanderson*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 753.

63. EVIDENCE—Another Action—Pleadings.——When defendant pleads that plaintiff has sued another party as his debtor for the same transaction, the pleadings in the other suit are admissible to show the fact of suit brought and the nature of the action.—*Kamm v. Bank of California*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 765.

64. ELECTIONS — Board of Canvassers—Contest.——Tha decision of the board of canvassers as to the result of an election, does not deprive parties of the right to contest the result of the election before the superior court.—*Roberts v. Calcert*, S. C. N. Car., Dec. 5, 1887; 4 S. E. Rep. 127,

65. EXECUTORS—Claims—Requisites of Claim.——In Indiana a claim against a decedent's estate must be made by a succinct and definite statement of the claim. A statement which only alleges that plaintiff is entitled to a share of a judgment against a gravel road company, is good on demurrer, although it fails to connect the deceased with that judgment.—*Culver v. Yandt*, S. C. Ind., Nov. 28, 1887; 14 N. E. Rep. 91.

66. EMINENT DOMAIN — Damage—Testimony.——The opinions of witnesses as to the damage done to land by taking part of it by eminent domain, is not conclusive on the jury, and when it is apparent that operating a railroad near buildings increases the risk, the jury may consider it in their estimate of damages, though no witness testifies directly thereto.—*Johnson v. Chicago, etc. Co.*, S. C. Minn., Dec. 13, 1887; 35 N. W. Rep. 438.

67. EMINENT DOMAIN — Damages — Title. ——In an action to assess damages for property taken for a railroad, when the title is in dispute, evidence that the plaintiff does not own part of the property, and that his claim is excessive, is admissible.—*Pa. St. R. R. v. Keller*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 381.

68. EQUITY — Decedent — No Administration. —— A creditor may maintain a bill in equity against the heirs who take possession of the estate without administration, when it exceeds the exemptions allowed by law.—*Cameron v. Cameron*, S. C. Ala., July 20, 1887; 3 South. Rep. 148.

69. EMINENT DOMAIN—State—Title.——The State of Pennsylvania has the fee of land taken by it in eminent domain.—*Delosier v. Penn. Canal Co.*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 400.

70. EMINENT DOMAIN — Pleading. —— A complaint which states that the property sought to be taken under the right of eminent domain is necessary to the plaintiff for the construction and operation of its railroad, the building of shops and side tracks, etc., sufficiently states the cause of action of the plaintiff.—*Sucer v. Chicago, etc. Co.*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 12.

71. EMINENT DOMAIN—Statute—Jurors.——Construction of Illinois statute relative to the formation of juries, to assess damages for property taken under the right of eminent domain.—*Kiernan v. Chicago, etc. Co.*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 18.

72. EQUITY—Fraud—Mortgage.——Where one made two mortgages on the same land, and was offered by two parties enough money to pay both, but agreed that the land should be sold under each mortgage and bought by the persons making the offer, one of the parties bought under one mortgage and the other under the other mortgage. One of the mortgages proving to be void, the purchaser under the other refused to divide the land with his confederate, or to pay the full amount of the purchased money: *Held*, that a court of equity would take jurisdiction and adjust the rights of the parties to the transaction.—*Long v. McGregor*, S. C. Miss., Nov. 21, 1887; 3 South. Rep. 240.

73. EQUITY — Mistake — Sheriff's Deed.——Where a sheriff's deed contains a mistake in the date of a judgment on which it is founded, such mistake will be corrected in a court of equity.—*Hawley v. Simons*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 7.

74. EQUITY—Reforming Instrument—Fraud.——Evidence to reform an instrument for fraud, accident or mistake, must be clear, precise and undebatible.—*Sylims v. Kosek*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 392.

75. ESTOPPEL —Evidence — Jury.——Where a party sets up an estoppel and offers parol evidence to prove it, which is sufficient if believed, the court cannot withdraw the evidence from the consideration of the jury.—*Wilcox v. Rowley*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 397.

76. EXECUTION—Exemption—Cotton.——The exemption, which cannot be waived, applies to wearing apparel, household and kitchen furniture and provisions, but does not apply to cotton.—*Butler v. Shicer*, S. C. Ga., May 3, 1887; 4 S. E. Rep. 115.

77. EXECUTION—Sale — Distribution.——There must be material facts in issue, which must clearly appear in the affidavit, in order that a court may, under the Pennsylvania act, direct an issue on the distribution of money arising from sales under execution.—*Irvin's Appeal*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 430.

78. ERROR—Writ of—Service of Notice—Parties.—— An administrator brought a bill for direction and to marshal assets, making many creditors defendants. He took a writ of error from the decree: *Held*, that he should serve with a notice all the defendants interested in sustaining the decree.—*Baker v. Thompson*, S. C. Ga., March 30, 1887; 4 S. E. Rep. 107.

79. EXECUTION — Supplementary Proceedings — Affidavit.——The affidavit for an examination of the defendant, after execution, need not specify what property the defendant is believed to have, its object being to compel a discovery.—*Magruder v. Shelton*, S. C. N. Car., Dec. 12, 1887; 4 S. E. Rep. 141.

80. FALSE IMPRISONMENT — Officers. ——The sheriff and constable are protected in executing the writ of a court of general jurisdiction having cognizance of such cases, and so in the prosecuting attorney in putting it into effect.—*Lloyd v. Hann*, S. C. N. J., Nov. 26, 1887; 11 Atl. Rep. 316.

81. FALSE PRETENSES —Fraudulent Claim—Municipal Corporations—Statute.—Under the laws of Ohio, one who presents a false and fraudulent claim against a corporation is guilty of a crime cognizable by the courts.—*Hauck v. State*, S. C. Ohio, Nov. 22, 1887; 14 N. E. Rep. 92.

82. FEDERAL QUESTION—Res Adjudicata.——Where defendant pleaded in a State court a former judgment of the United States Supreme Court, but the supreme court of the State refused to consider it, because it did not appear in the printed brief, though it was presented in the pleadings and assignment of errors: *Held*, that this was a decision against the federal right claimed and was reviewable by this court.—*Des Moines, etc. Co. v. Iowa, etc. Co.*, U. S. S. C.. Dec. 5, 1887; 8 Sup. Ct. Rep. 217.

83. FRAUDS—Statute of—Contract—Performance.—— In an action of *quantum meruit* for work done, where the contract, which was originally in writing and then verbally altered, and as altered was not to be performed in a year, evidence of the alteration is admissible to give an understanding of the circumstances of the affair.—*Keller v. Bley*, S. C. Oreg., Nov. 21, 1887; 15 Pac. Rep. 705.

84. FRAUD — Statute of — Part Performance. —— A parol agreement to convey land cannot be enforced on the ground of part performance, where the plaintiff merely lived with her mother on the premises without asserting title thereto. the case is within the statute of frauds.—*Gorham v. Dodge*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 44.

85. FRAUD—Rescission of Contract.——Circumstances stated under which a party who has sold goods to an insolvent firm upon false and fraudulent representations of their solvency, may be permitted, under the laws of Mississippi, to rescind the contract after the firm has made an assignment for the benefit of creditors.—*Frank v. Robinson*, S. C. Miss., Dec. 5, 1887; 14 N. E. Rep. 253.

86. FRAUDULENT CONVEYANCE. —— When a debtor buys property with money which might have been subjected to the payments of his debts, and takes the title in the name of a volunteer, such property may be taken for his debts, unless he can show that he had sufficient other property to pay his debts when the purchase was made or when the action was brought.—*Euler v. Crull*, S. C. Ind., Nov. 18, 1887; 14 N. E. Rep. 79.

87. FRAUDULENT CONVEYANCE—Bona Fide Purchaser—Trustee.——Where a deed to a trustee to hold for the grantor is charged to be fraudulent, the *bona fides* of the

trustee is immaterial. The title of one, who buys to defeat the title claim of creditors of the seller, is invalid, though he pays a fair price.—*Eigenbrun v. Smith*, S. C. N. Car., Dec. 5, 1887; 4 S. E. Rep. 122.

88. GAMBLING—Option Contracts.——Where one puts money in the hands of another to sell grain for future delivery, he cannot recover it from the agent on the ground that the contracts made by him were illegal, when the State law only makes options to sell or buy at a future time illegal.—*White v. Barber*, U. S. S. C., Dec. 5, 1887; 8 S. C. Rep. 221.

89. GARNISHMENT — Judgment — Lien. —— Where a garnishee held personal property which was subject to the garnishment, and his own creditor had a judgment against him, that judgment had no lien on the property in the hands of one who had obtained it from the garnishee.—*McGarry v. Lewis, etc. Co.*, S. C. Mo., Nov. 28, 1887; 6 S. W. Rep. 81.

90. GIFTS—Delivery. —— Any act which indicates a renunciation of dominion by the donor and transfer of dominion to the donee will support a gift at common law, and, under the Georgia code, actual manual delivery is not essential.—*Poullain v. Poullain*, S. C. Ga., April 21, 1887; 4 S. E. Rep. 81.

91. GIFTS—Land—Parol. ——A parol gift of land may be inferred from acts of an unambiguous and unequivocal character, as such as necessarily result from the gift, and they must be established by clear, definite and certain evidence. The improvements made by the donee in possession of the land, under an alleged parol gift, though slight, are sufficient to pass the title, if they are substantial and permanent, and are made in reliance on the gift, and are such as none but an owner would make.—*Poullain v. Poullain*, S. C. Ga., June 1, 1887; 4 S. E. Rep. 92.

92. GRAVEL ROADS— Assessments—Statutes.——Construction of Indiana statutes with reference to gravel roads, and proceedings under those statutes.—*Fleener v Claman*, S. C. Ind., Nov. 16, 1887; 14 N. E. Rep. 76.

93. GUARDIAN AND WARD—Accounting —Amendment. ——An infant may sue his guardian by *prochein ami* for an accounting. An exception to the auditor's finding that the suit is barred by the guardian's discharge may be amended by alleging fraud in obtaining the discharge and setting out facts showing the discharge, provided the original cause of action is not barred.—*Poullain v. Poullain*, S. C. Ga., June 1, 1887; 4 S. E Rep. 93.

94. GUARDIAN AND WARD — Bond — Deceased Surety. ——A suit to sell the real estate of a deceased surety on a guardian's bond, the personal estate being insufficient, cannot be maintained, when no suit has been brought on the bond to ascertain the liability.—*Williams v. McNair*, S. C. N. Car., Dec. 5, 1887; 4 S. E. Rep. 131.

95. GUARDIAN AND WARD—Bond—Surety. ——Where the wards fail within three years after attaining their majority to compel a full settlement from their guardian, the sureties on his bond are released, except as to those ward who continued under disability, even those the estate of a deceased surety is not administered on —*Williams v. McNair*, S. C. N. Car., Dec. 5, 1887; 4 S. E Rep. 131.

96. GUARDIAN AND WARD—Laches—Surety.——Where a surety of a defaulting guardian dies intestate and his property (all personal) is paid over to his heir and six years elapses, no claim upon the estate being made during that time by the ward, the heir will not be liable. —*People to use, etc. v. Brooks*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 39.

97. HIGHWAYS — Encroachments — Judgment. — When justices of the peace and surveyors of highways have determined in writing the encroachments on a highway, such action is binding, until it is set aside or reversed, and they cannot make a new determination. —*State v. Briggs*, S. C. N. J., Nov. 16, 1887; 11 Atl. Rep. 423.

98. HIGHWAYS — Municipalities — County Commissioners.—— The establishment of a city or town under the general law over territory, where a public road exists, does not abolish the road as a public highway, and though a railroad fails to do its duty at a crossing over such road, the county commissioners are not relieved of their duty, and may be compelled to act by *mandamus* —*State v. Putnam Co.*, S. C. Fla., Nov. 23, 1887; 3 South. Rep. 164.

99. HIGHWAYS—Railroads —Alteration.—— A railroad may construct its road along, upon or across a highway, or put the track over or under it, or alter its course, if necessary, but it must be so arranged, that it is convenient for travel along it as a public road. The highway cannot be destroyed unless the grant unmistakably gives that power.—*Palatka, etc. R. Co. v. State*, S. C. Fla., Nov. 12, 1887; 3 South. Rep. 158.

100. HOMESTEAD — Declaration —Absence.——A declaration of homestead, filed while the wife is absent for four months, and the husband is lodging elsewhere, is not valid.—*Moloney v. Hefer*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 763.

101. HOMESTEAD—Right of Allotment—Execution Sale. ——When land is sold under execution against one, who has a right to have the land set apart as his homestead, which is not done, the sale is void, but his claim against the sheriff is only for costs and damages under North Carolina law.—*McCracken v. Alder*, S. C. N. Car., Dec. 12, 1887; 4 N. E. Rep. 138.

102. HOMESTEAD — Sale.——The act of 1878, touching the sale of homesteads, applies to those created before and after the act. Though the debt was created before the act, the creditor cannot subject a so-called reversion therein, either before or after a sale made under the act.—*Van Horn v. McNeill*, S. C. Ga., April 25, 1887; 4 S. E. Rep. 111.

103. HOMESTEAD—Separate Tracks.——Where a person holds two tracks of land near to each other resides on one and cultivates both and both, taken together are within the limits prescribed by the homestead acts as to extent and as to value, they constitute one homestead. —*Dicus v. Halls*, S. C. Ala., Dec. 16, 1887; 3 South. Rep. 239.

104. HOMICIDE—Bail.——Circumstances stated under which bail is denied to a person accused of murder who testified that he "did the shooting."—*Ex parte Hamilton*, S. C. Miss., Nov. 21, 1887; 3 South. Rep. 241.

105. HUSBAND AND WIFE—Contract.——A contract by a husband with his wife, that he will pay her $200 a year if she will continue to live with him as his wife, and that he will do his duty henceforth as her husband, is without consideration.—*Miller v. Miller*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 461.

106. HUSBAND AND WIFE—Descent.——Where a man marries the second time, his first wife being undivorced and dies leaving property acquired during the second marriage, his property will be shared by the two wives, if the second wife contracted that relation innocently and in ignorance of the facts.—*Jermann v. Tenneas*, S. C. La., Dec. 5, 1887; 3 South. Rep. 229.

107. HUSBAND AND WIFE—Post-nuptial Contract.—— A bond given by a husband in persuance of a post-nuptial contract with his wife, which contract stipulated that the bond was only to be due in case he mistreated her, is not void and may be enforced, if he mistreats her.—*Reamey v. Bayley*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 438.

108. HUSBAND AND WIFE —Separate Estate—Disposal. ——A mortgage made by a trustee at the written request of a married woman in accordance with the deed, which was made after 1870, is valid as to her. The deed being for the sole and separate use and benefit of the wife and her children with the right to sell, dispose of and convey it by her, the mortgage must be limited to her interest as a tenant in common with her children.— *Wallace v. Craig*, S. C. S. Car., Nov. 29, 1887; 4 S. E. Rep. 74.

109. INDICTMENT — Obtaining Money Upon False Pretenses — Misnomer. —— An indictment for obtaining money under false pretenses which mistates christian names of the defendant and of the party defrauded, is invalid, under the laws of Missouri, Rev. Stat. § 1561.— *State v. Horn*, S. C. Mo., Nov. 28, 1887; 6 S. W. Rep. 96.

110. INTOXICATING LIQUOR — Attorney's Fee.——An attorney selected by a peace officer to prosecute one for keeping liquors for unlawful sale, is entitled to the fee provided by law to be paid by the county.—*Work v. Wapello Co.*, S. C. Iowa, Dec. 10, 1887; 35 N. W. Rep. 452.

111. INTOXICATING LIQUORS—Municipal Corporations—Local Option. —— Where a district including a city voted to prohibit the sale of liquors and afterwards the city voted to permit the sale of liquors but without any legislative authority: *Held*, that the latter vote was invalid and illegal, and that the prohibtion by the district vote is in full force.—*Commonwealth v. King*, Ky. Ct. App., Dec. 17, 1887; 6 S. W. Rep. 124.

112. INTOXICATING LIQUORS — License — Appeal. —The supreme court on appeal from a decision of the quarter sessions refusing a liquor license will not review the facts of the case.—*Leister's Appeal*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 387.

113. INTOXICATING LIQUORS — Sale—Liability—Statute. ——Under the law of Mississippi, the person owning premises on which intoxicating liquors are sold, contrary to the law, is criminally liable for a sale made by his employee, in his absence, without his knowledge and against his orders.—*Treasdale v. State*, S. C. Miss., Jan. 17, 1887; 3 South. Rep. 245.

114. INSOLVENCY — Assignment by Partnership. —— Where the partners of an insolvent firm assign all the property owned by them wherever situate their separate property is included.—*Security Bank v. Beede*, S. C. Minn., Dec. 13, 1887; 35 N. W. Rep. 435.

115. INSOLVENCY — Judgment—Fraud.——Where defendant applies to have an execution stayed by reason of his discharge in insolvency, the court can go behind the judgment to show that it was founded on a fraud on his part, from which he was not discharged.—*Carit v. Williams*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 751.

116. INSOLVENCY — Laws—Attachment- Lien—Statute. ——Construction of Maryland insolvency laws. What liens attachment, mesne or final, have as against the operation of those laws.—*Thomas v. Brown*, Md. Ct. App., June 23, 1887; 10 Atl. Rep. 713.

117. INSURANCE—Agent—Estoppel.——Where, in an application for life insurance, the insured declines to give his age, stating that he did not know it, and the defendant's agent inserted the age in the policy and after the contract had existed for some time: *Held*, that the defendant was estopped from repudiating the contract on account of alleged misrepresentations of the age of the insured.—*Miller v. Phœnix, etc. Co.*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 271.

118. INSURANCE — Mutual Benefit Assessments.—— Where the law of a mutual benefit association requires assessments to be ordered by the board of directors, and the chairman to approve all proofs of death, for which an assessment is to be ordered, an assessment, ordered by the secretary under order from the board so to do, if the chairman found the proof of death to be correct, is valid, and a member who does not pay it forfeits his claim.—*Passenger, etc. Co. v. Birnbaum*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 378.

119. JUDGMENT—Arrest of Judgment—Demurrer.—— A motion in arrest of judgment will not be entertained, when a demurrer has been filed and overruled and the demurrer has joined issue and gone to trial on the merits.—*Independent Order, etc. v. Paine*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 42.

120. JUDGMENT—Assignment of Part.——Where a part of a judgment is assigned to A and the rest to B, A cannot obtain a separate judgment for his part by *scire facias*.—*Hopkins v. Stockdale*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 368.

121. JUDGMENT—Confession of—Attorney. ——Where an attorney has a power to confess a judgment, the determination of his fee for that service rests in the discretion of the court, and cannot be adjudicated by the clerk in vacation.—*Campbell v. Goddard*, S. C. Ill., Nov. 8, 1887; 14 N. E. Rep. 261.

122. JUDGMENT — Erroneous Entry — Correction.—— The erroneous entry of a judgment can only be corrected by appeal.—*Putnam v. Webb*, S. C. Oreg., Nov. 23, 1887; 15 Pac. Rep. 711.

123. JUDGMENTS—Foreign—Justice of the Peace. —— When the transcript of a justice's judgment, filed in a court of common pleas, is directed by law to be treated as a judgment of that court, it must be so treated when sued on in another State.—*Rowley v. Carron*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 435.

124. JUDGMENT — Res Adjudicata.——Where one interested, as having similar rights, interests himself in obtaining a decision favorable to his interests and pays part of the expenses, the judgment does not estop him. —*Litchfield v. Crane*, U. S. S. C., Dec. 5, 1887; 8 S. C. Rep. 210.

125. JUDGMENT—Res Adjudicata—Trusts. ——Where, in a suit against a trustee, the *cestui que trust* employs counsel and files an answer in the name of the trustee; the decision therein can be pleaded as *res adjudicata* in a suit between the same plaintiff and the *cestui que trust*. —*Plumb v. Crane*, U. S. S. C., Dec. 5, 1887; 8 S. C. Rep. 216.

126. JURY—Trial—Equity.——Where a defendant pays money into court to await the decision of conflicting claims by plaintiff and another party, a case is a case in equity, the court may order a jury to find the facts, but may disregard its verdict and find the facts for itself against the verdict.—*Clark v. Mosher*, N. Y. Ct. App., Oct. 11, 1887; 14 N. E. Rep. 96.

127. JUSTICE OF THE PEACE—Attachment—Appeal.—— In Pennsylvania, a justice of the peace has jurisdiction to $300 in cases of attachment execution. An appeal from a justice cures all irregularities, and the case is heard *de novo*. An attachment execution served on a bank prevails over a check made prior to, but presented after the garnishment.—*Kuhn v. Warren S. Bank*. S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 440.

128. JUSTICE OF THE PEACE — Judgment — District Court.——A district court cannot enforce the execution of a judgment rendered by a justice of the peace, and a writ of prohibition will lie to prevent such action.— *State v. Livandais*, S. C. La., Nov. 21, 1887; 3 South. Rep. 185.

129. JUSTICE OF THE PEACE—Jurisdiction—Corporations.——Justice of the peace, away from the domicile of a corporation, have no jurisdiction over it for trespass or damage done by it.—*State v. Huft*, S. C. La., Nov. 21 1887; 3 South. Rep. 180.

130. JUSTICE OF THE PEACE—Trial—Jury ——Where, after one trial by a jury, which disagreed, neither party asks for another jury, the justice can proceed to try and determine the case.—*State v. Hathaway*, S. C. N. J., Nov. 16, 1887; 11 Atl. Rep. 343.

131. LANDLORD AND TENANT—Pleading.——Where, in an action for rent, defendant's plea was that he was ousted of possession by reason of fire, the replication alleged that he was not ousted by fire, although the premises had been damaged by fire. A demurrer to this replication was properly overruled.—*Smith v. McLean*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 50.

132. LANDLORD AND TENANT—Trespass—Holding Over. ——Where a tenant holds over for several years, notwithstanding his landlord's notice to quit, the landlord may treat him as a trespasser, and recover not merely the rent previously paid, but a larger sum by way of damages.—*Keegan v. Kinnark*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 14.

133. LARCENY—Possession. ——Actual manual possession of the property alleged to have been stolen is not necessary, in Texas, to constitute the crime of larceny.— *Connor v. State*, Tex. Ct. App., Nov. 12, 1887; 6 S. W. Rep. 138.

134. LIBEL AND SLANDER—Chastity.——A statement, that a woman had promised to allow the accused to have criminal intercourse with her, does not come under Code North Carolina, § 1113.—*State v. Moody*, S. C. N. Car., Nov. 28, 1887; 4 S. E. Rep. 119.

135. LIMITATIONS — Adverse Possession — Jury.—— Whether a party holding land and claiming title under

the statute of limitations has such continuous adverse hostile possession as will entitle him to the benefit of the statute, is a question for the jury.—*Mason v. Ammon*, C. Penn., Oct. 3, 1887; 11 Atl. Rep. 449.

136. LIMITATION—Statute — Action—Conflict of Laws.——Where an obligation contracted in another State has been completely barred by the statute of limitations of that State, that statute will bar a action thereon in Tennessee. *Aliter*, when the obligor has removed in Tennessee before the bar of the statute is fully formed.—*Kempe v. Bader*, S. C. Tenn., Dec. 11, 1887; 6 S. W. Rep. 126.

137. LANDLORD AND TENANT—Use and Occupation.——The heirs of a deceased lessor cannot maintain an action for use and occupation against the lessee, where the lease provides that the rent shall be applied to the payment of a debt due to the lessee.—*Jackson v. King*, S. C. Ala., May 23, 1887; 3 South. Rep. 232.

138. MASTER AND SERVANT—Contract of Hiring—Damages.——An agreement, in a contract of hiring, that the servant shall give two weeks' notice before leaving his employment, and upon failure to do so whatever is due upon his leaving, shall be regarded as liquidated damages to the master, is void.—*Schimpf v. Tenn., etc. Co.*, S. C. Tenn., Dec. 17, 1887; 6 S. W. Rep. 131.

139. MECHANIC'S LIEN—Vendor and Vendee.——Where a vendor agrees with his vendee that the latter shall make improvements on the property sold, and that he (the vendor) would pay a certain sum of money therefore, and the vendee accordingly contracted with a mechanic for such improvements: *Held*, that the mechanic had a lien on the property, although the title had reverted to the vendor.—*Henderson v. Connolly*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 1.

140. MORTGAGE—Advances — Payments.——Where a mortgage is given to secure advances, and further money being needed, it is agreed such advances shall be first paid out of the first proceeds of the crop, such credits will be recognized as proper, leaving the mortgage in full force over the other property mortgaged.—*Mercer v. Tift*, S. C. Ga., April 27, 1887; 4 S. E. Rep. 114.

141. MORTGAGES—Extension of Time—Note.——In a proceeding to foreclose a mortgage, an agreement of extension of the note upon sufficient consideration, which extension has not yet expired, is a good defense.—*Ely v. Ryan*, S. C. Neb., Nov. 23, 1887; 35 N. W. Rep. 225.

142. MORTGAGE—Merger.——Where two tracts of land were mortgaged for the same debt by separate deeds, and one was conveyed by the mortgagor with a stipulation that it was liable for the mortgaged debt, the vendee then obtaining control of the note, caused the other tract to be sold and conveyed to him: *Held*, that the second tract was released from the mortgage by the sale of the first, and that the purchase by the vendee of the note was equivalent to the payment of it and worked a merger.—*Drury v. Holden*, S. C. Ill., May 12, 1887; 13 N. E. Rep. 547.

143. MORTGAGE—Redemption — Release.——A release of the right of redemption in case of sale under a mortgage, and of the right to avoid the sale, if the mortgagee becomes the purchaser, does not take away the right to file a bill in equity for an account and redemption.—*Fields v. Helms*, S. C. Ala., July 12, 1887; 3 South. Rep. 106.

144. MORTGAGE—Release—Penalty.——After a mortgagor has paid the mortgagee, who has accepted the money in full payment, if the latter refuses to release the money after request and tender of charges, he is liable, after seven days, to the mortgagor for $100 as exemplary damages, under the law.—*Shields v. Klopf*, S. C. Wis., Nov. 22, 1887; 35 N. W. Rep. 284.

145. MORTGAGE—Release—Renewal.——When a note is paid and the mortgage is returned, and afterwards on a similar loan the old note and mortgage are given to the creditor for security, the creditor may sue for the debt but cannot foreclose the mortgage.—*Thompson v. George*, Ky. Ct. App., Nov. 17, 1887; 5 S. W. Rep. 760.

146. MORTGAGE—Taxes—Payment by Mortgagee. — When an action in ejectment is brought and defendant claims title under a tax-deed, the land having been sold for taxes and the certificate having been taken by a mortgagee's agent, who assigned it to a third party, who obtained the deed, and at the agent's request conveyed the property to the defendant, neither party paying anything, the defendant has no title under the deed.—*Burchard v. Roberts*, S. C. Wis., Nov. 22, 1887; 35 N. W. Rep. 286.

147. MORTGAGE — Sale — Price—Affidavit.——Mere inadequacy of price in a sale under a mortgage is no ground for setting it aside, especially when there is a right of redemption. Failure to file the affidavit of expenses and disbursements does not affect the validity of the sale.—*Johnson v. Cocks*, S. C. Minn., Dec. 13, 1887; 35 N. W. Rep. 436.

148. MORTGAGES — Taxes — Payment.——Where the mortgagee is authorized to pay the taxes, if the mortgagor fails to do so, and charge the amount on the mortgage, he is entitled to charge his payment to an expert tax-examiner, who examined and obtained a reduction of taxes.—*Equitable L. A. S. v. Von Glahn*, N. Y. Ct. App., Oct. 25, 1887; 13 N. E. Rep. 793.

149. MORTGAGE — Vendor's Lien—Notice—Priority.——Where the mortgagee of land, which remains in possession of the mortgagor, has actual notice of an unsatisfied vendor's lien, his mortgage will be postponed to that lien; a burden of proof is upon him to show, if he can, his ignorance of the existence of the lien.—*Seymour v. McKinstry*, N. Y. Ct. App., Oct. 11, 1887; 14 N. E. Rep. 94.

150. MORTGAGE—When—Possession.——A deed, absolute in its terms and conveying the fee, passes title, and is not turned into a mortgage, because the grantee signs an indorsement on it to return and cancel it on repayment of the money with interest at a certain time. Possession in the grantor is not available under prescription or the statute of limitations in an action of ejectment founded on such a deed.—*Jay v. Welchel*, S. C. Ga., April 4, 1887; 3 S. E. Rep. 906.

151. MUNICIPAL CORPORATIONS.——When a paper, purporting to be the bond of a township, has been issued without consideration, the holder, whether payee or assignee, cannot recover upon it. Construction of Indiana statutes upon the subject.—*State ex rel. v. Cohen*, S. C. Ind., Nov. 28, 1887; 14 N. E. Rep. 87.

152. MUNICIPAL CORPORATIONS—Actions Against—Demand.——The statute of New York, which forbids actions to be brought against a municipal corporation before a demand for payment has been made of the proper officer, applies only to actions *ex contractu* and not to actions *ex delicto*.—*Hunt v. City*, N. Y. Ct. App., Oct. 18, 1887; 14 N. E. Rep. 97.

153. MUNICIPAL CORPORATIONS — Appointing Officers.——The law, making it the duty of the governor to appoint a board of fire and police commissioners for cities of the metropolitan class, is constitutional.—*State v. Seavey*, S. C. Neb., Nov. 23, 1887; 35 N. W. Rep. 228.

154. MUNICIPAL CORPORATIONS — Certificates — Payment.——Where the suit is upon certificates of appropriation, evidencing claims for municipal expenses for several years, the judgment should be restricted to payment out of the revenues for the several years in which the claims arose.—*Creole S. F. Co. v. New Orleans*, S. C. La., Nov. 21, 1887; 3 South. Rep. 177.

155. MUNICIPAL CORPORATIONS — Boroughs—Licenses.——Where a borough is authorized to make such ordinances as are necessary to promote the peace, good order, benefit and advantage of the borough, it may pass an ordinance requiring book agents to take out a license with a penalty for a failure to do so.—*Borough of Warren v. Geer*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 415.

156. MUNICIPAL CORPORATIONS—Division—Limitations.——Where a portion of one town is added to another, if the supervisors of the two towns fail to apportion between the two towns the debt of the first, the statute of limitations will run on the subject.—*People v. Town of Oran*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 726.

157. MUNICIPAL CORPORATION—Negligence.—— A municipal corporation is not liable for damages caused by

an honest mistake of judgment made by a public officer in the fair discharge of his duty.—*Shiel v. Township of Collier*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 366.

158. MUNICIPAL CORPORATIONS—Opening Streets.——The act of May 14, 1874, does not apply to streets in Philadelphia, which have been already located.—*In re Magnolia Avenue*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 405.

159. MUNICIPAL CORPORATIONS—Ordinances—Nuisance.——An ordinance, that all hog-pens, or lots now used as such, are a nuisance, is too broad and is invalid.—*Ex parte O'Leary*, S. C. Miss., Nov. 28, 1887; 3 South. Rep. 144.

160. MUNICIPAL CORPORATIONS—Practice.——The addition of the word "civil" to the name of a civil township does not effect the validity of proceedings against the township.—*Vogel v. Brown*, S. C. Ind., Nov. 17, 1887; 14 N. E. Rep. 77.

161. MUNICIPAL CORPORATION — Process.——A summons directed against the trustee, and not against the township, is not valid as against the township.—*Vogel v. Brown School*, S. C. Ind., Nov. 18, 1887; 14 N. E. Rep. 78.

162. MUNICIPAL CORPORATIONS — Scales. —— Under Iowa laws, a town may erect scales and regulate their use by reasonable ordinances and appoint a weigh-master.—*Davis v. Town of Anita*, S. C. Iowa, Dec. 6, 1887; 35 N. W. Rep. 244.

163. MUNICIPAL CORPORATIONS—Streets—Railroads.——The city of Denver only acquired a qualified fee to its streets, and abutting property owners have a right of action for injuries sustained by the running of railroad trains along the streets, though such use is authorized by the city.—*Denver, etc. R. Co. v. Nestor*, S. C. Colo., Nov. 15, 1887; 15 Pac. Rep. 714.

164. MUNICIPAL CORPORATIONS—Streets.——A privilege given to an abutting proprietor to construct a veranda over the sidewalk is a mere license, which the city may revoke at any time and remove the obstruction.—*Winter v. City Council of Montgomery*, S. C. Ala., Dec. 16, 1887; 3 South. Rep. 235.

165. MUNICIPAL CORPORATIONS—Street Improvements—Damages.——When the grade of two parallel streets is to be changed, which will compel a change of grade of intersecting streets, the damage caused by the latter change of grade should be included in the damages for the change in the parallel streets, though not specified in the ordinance.—*Conklin v. City of Keokuk*, S. C. Iowa, Dec. 9, 1887; 35 N. W. Rep. 444.

166. MUNICIPAL CORPORATIONS—Street Improvements—Ordinance.——Where, after a contract for street improvement is let, the city council appoints a superintendent of the work, it is a compliance with an ordinance requiring the lowest and best bid to be submitted to the council for action.—*Main v. City of Fort Smith*, S. C. Ark., Nov. 5, 1887; 5 S. W. Rep. 801.

167. MUNICIPAL CORPORATIONS — Water-rents—Revenue.——Under act Cal. 1858, § 35, fifty five per cent. of the gross revenue from the water rents collected by the city of Sacramento must be set aside to pay the bonds of the city and the interest thereon.—*Bates v. Porter*, S. C. Cal., Dec. 1, 1887; 15 Pac. Rep. 732.

168. MURDER — Evidence — Instruction. —— Upon a trial of a defendant for the murder of his wife, the admission in evidence of a petition for divorce filed against him by his wife and charging gross misconduct, is improper, and error is not cured by an instruction to the jury to disregard such evidence.—*State v. Kuehner*, S. C. Mo., Nov. 28, 1887; 6 S. W. Rep. 118.

169. NEGLIGENCE — Contributory—Crossing.——Where a driver, on approaching a dangerous crossing, leaves his team and gets on a sleigh ahead of his, sitting with his back towards the dangerous crossing and is closely muffled up, he is guilty of gross contributory negligence.—*Gunn v. Wisconsin, etc. R. Co.*, S. C. Wis., Nov. 22, 1887; 35 N. W. Rep. 281.

170. NEGLIGENCE — Contributory—Crossing.——Where a crossing is dangerous, and the view is obstructed, and without stopping it is difficult, owing to the noi , to hear whether a train is coming or not, and the pa in-jured knew a train was then due, he is guilty of contributory negligence in not stopping to ascertain.—*Seefeld v. Chicago, etc. R. Co.*, S. C. Wis., Nov. 22, 1887; 35 N. W. Rep. 278.

171. NEGLIGENCE — Contributory—Jury.——Where a person is injured at a crossing by a railroad train, it is generally a question of fact for the jury, whether he was guilty of contributory negligence.—*Omaha, etc. R. Co. v. O'Donnell*, S. C. Neb., Nov. 23, 1887; 35 N. W. Rep. 235.

172. NEGLIGENCE—Death—Parties.——Where a wife sues for herself and her two minor children for damages for the death of her husband, and it appears his mother is living, she must be made a party, or the petition should be amended to make her a beneficiary.—*East Line, etc. Co. v. Culberson*, S. C. Tex., Oct. 28, 1887; 5 S. W. Rep. 820.

173. NEGLIGENCE—Death—Parties to Action.——Under Texas law, any one of the parties entitled to damages for the death of another, may bring an action for the benefit of all.—*Texas, etc. R. Co. v. Berry*, S. C. Tex., Jan. 18, 1887; 5 S. W. Rep. 817.

174. NEGLIGENCE—Employee—Passenger.——A railroad is liable for injuries sustained by a passenger caused by the negligence of one left by the employees in charge of an engine, though he was not properly employed.—*Lakin v. Oregon, etc. R. Co.*, S. C. Oreg., June 13, 1887; 15 Pac. Rep. 641.

175. NEGLIGENCE—Railroad — Fires.——When a fire starts from sparks from a locomotive, a presumption arises that the company was guilty of negligence, but this can be rebutted by proof that they used the best spark arresters and kept them in good order. Where the fire starts from accumulations on their right of way, it is for the jury to say whether they were guilty of negligence in not removing it.—*Gulf, etc. R. Co. v. Benson*, S. C. Tex., Oct. 28, 1887; 5 S. W. Rep. 822.

176. NEGLIGENCE — Shipping — Surgeon. —— Where ship owners use reasonable care and diligence in selecting a surgeon for the ship, they are not liable to a passenger for his negligence.—*Laubheim v. Netherland, etc. Co.*, N. J. Ct. App., Oct. 18, 1887; 13 N. E. Rep. 781.

177. NEGOTIABLE INSTRUMENTS — Demand — Notary Public.——If a notary public shall go to the place of business of the acceptor to demand payment of a bill of exchange and finds it closed, his demand is effectual, although it is in evidence that the exceptor had previously made an assignment and mortgage on his property.—*Sulzbacher v. Bank*, S. C. Tenn., Dec. 15, 1887; 6 S. W. Rep. 129.

178. NUISANCE—Sidewalk.——One who obstructs the sidewalk of a street for four or five hours of each day is guilty of creating a public nuisance.—*Callanan v. Gilman*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 264.

179. NUISANCE — Unloading Cars — Switching.——A prayer to restrain a railroad from unloading its cars on the street, and from constantly switching cars back and forth on the street, is proper and should be granted.—*Kavanagh v. Mobile, etc. R. Co.*, S. C. Ga., April 26, 1887; 4 S. E. Rep. 113.

180. PARTITION—When Admissible.——Partition may be made between co-tenants in possession, though one has a life estate and the other is an owner in fee.—*Black v. Washington*, S. C. Miss., Nov. 21, 1887; 3 South. Rep. 140.

181. PARTNERSHIP — Accounting—Proof.—— Upon an accounting between A, B and C, partners, it was admitted that money for the partnership had been paid to A, which he claimed he had paid to B: *Held*, that the burden of proof of payment to B was on A.—*Silverthorn v. Brands*, N. J. Ct. Err. & App., March Term, 1887; 11 Atl. Rep. 328.

182. PARTNERSHIP — Authority of Partner. —— One partner may dispose of a patent-right belonging to the firm, and his partners cannot deprive him of that power.—*Christ v. Firestone*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 395.

183. PARTNERSHIP—Chattel Mortgage—Promise to Pay

Another's Debt.—When a partner puts into the partnership personal property, on which there was an unrecorded mortgage, the creditor's only remedy is against the partner's interest in the firm assets. When one partner promises to pay half of the debt of his partner, who puts his property into the firm, the creditor can sue on the promise.—*Ringo v. Wing*, S. C. Ark., Nov. 5, 1887; 5 S. W. Rep. 787.

184. PARTNERSHIP—Fraud—Accounting.—Two parties were partners in trying to sell mining claims, and one sold to the other his interest, the latter claiming he wished to buy the claims himself under the option, but he sold the next day a half interest under an agreement made during the partnership: *Held*, that the seller was entitled to an accounting.—*Caldwell v. Davis*, S. C. Colo., Nov. 25, 1887; 15 Pac. Rep. 696.

185. PARTNERSHIP—Fraud—Limitations.—Where A sells his interest to his partners, and on the same day they convey the property to a third party, with whom they were secretly negotiating, by deed placed in escrow, A is entitled to his interest as a partner in the proceeds of the sale. The statute of limitations cannot be claimed as a defense, first on appeal.—*Jennings v. Rickard*, S. C. Colo., Nov. 11, 1887; 15 Pac. Rep. 677.

186. PARTNERSHIP — Insolvency — Sale.—When an insolvent partnership conveys all its property for an antecedent debt and for money paid, the validity of the sale relative to its creditors is determined by the rules applicable to a purchase on an entirely new consideration.—*Owens v. Hobbie*, S. C. Ala., July 27, 1887; 3 South. Rep. 145.

187. PATENTS — For Inventions — Defenses.—The fourth and fifth defenses in suits for infringements of patents, authorized by § 4920, Rev. Stat., are separate, and each requires its appropriate notice to let in testimony to establish it.—*Meyers v. Busby*, U. S. C. C. (Cal.), Oct. 17, 1887; 32 Fed. Rep. 670.

188. PATENTS FOR INVENTIONS—Joint Invention.—Letters patent 140,315, for an apple paring and coring machine was issued to two patentees; but being composed of about twelve claims, one of which was invented by one of the patentees alone, a joint patent on such claim and part of a machine is invalid.—*Stewart v. Tenk*, U. S. C. C. (Ill.), Nov. 8, 1887; 32 Fed. Rep. 665.

189. PATENTS—Public Use.—Where a patentee had used his invention for more than four years previous to the date of his patent, and plaintiff alone supplied the market, selling several thousand gross of the articles produced thereby, and the evidence that his use of the machine prior to the patent was to perfect its mechanism and improve its operation, is vague and indefinite, the patent is void.—*Smith, etc. Co. v. Sprague*, U. S. S. C., Nov. 14, 1887; 8 S. C. Rep. 122.

190. PATENTS—Wash-boards.—Patent 187,842, issued February 27, 1877, for a wash-board, has no patentable novelty over patent 168,252, issued September 28, 1875.—*Pfanschmidt v. Kelly M. Co.*, U. S. C. C. (Minn.), Nov. 15, 1887; 32 Fed. Rep. 667.

191. PHYSICIANS—License.—The Colorado law, requiring physicians to have a certificate of qualification from the State board of examiners, is valid.—*Harding v. People*, S. C. Colo., Nov. 11, 1887; 15 Pac. Rep. 727.

192. PILOTS—Negligence—Fees.—Where a ship going through the channel strikes bottom and injures her keel, owing to a heavy and unusual wave, and the pilot is not carrying her through the main channel, on account of ice against which the owner had warned the pilot, the pilot is not guilty of negligence, and is entitled to his fees.—*The Wallace*, U. S. D. C. (N. Y.), Nov. 9, 1887; 32 Fed. Rep. 672.

193. PLEADINGS—Amendments — Trial.—The court may allow pleadings to be amended after the trial has commenced.—*Texarkana, etc. R. Co. v. Goldberg*, S. C. Tex., Oct. 28, 1887; 5 S. W. Rep. 824.

194. PLEADING—Breach of Lease.—A complaint, for breach of lease for not delivering certain personal property, need not allege that defendant is indebted to the plaintiff, nor that the debt remains due and unpaid.—*Harmon v. Moore*, S. C. Ind., Nov. 2, 1887; 13 N. E. Rep. 718.

195. PLEADING—Defense — Another Action.—A defense to a suit on a promissory note, that it was for the amount found due on a contract, which the parties had canceled, and given on an agreement by the plaintiff to hold defendant harmless from the covenants of the contract, whereas plaintiff was then suing the defendant on said covenants, is not pertinent to the action.—*Jefferson L. Co. v. Williams*, S. C. Tex., Oct. 25, 1887; 5 S. W. Rep. 672.

196. PLEADING—General Denial—General Issue.—A plaintiff may, under the plea of *general denial* or general issue, prove full or partial satisfaction of the plaintiff's demand.—*Indiana, etc. Co. v. Adams*, S. C. Ind., Nov. 19, 1887; 14 N. E. Rep. 80.

197. PLEADINGS — Separation and Maintenance.—In a suit for separation and maintenance, an answer that by fraud of complainant defendant was induced to marry her, is no defense.—*Fairchild v. Fairchild*, N. J. Ct. Chan., Dec. 8, 1887; 11 Atl. Rep. 426.

198. PLEADINGS—Township — Obstructing Alley.—Where the plaintiff, a township, alleges that defendant put ashes in the alley of a city, which the overseer of the road district removed, but fails to state that the city or road district is within the township, no cause of action is stated.—*Alma Township v. Cast*, S. C. Kan., Nov. 5, 1887; 15 Pac. Rep. 585.

199. PLEADINGS—Trying Title—Execution—Fraud.—Where the purchaser at execution sale sues to try title and get possession of real estate, an alligation in the answer, that he confederated with the officers not to levy on or sell the personal property, and that consequently the realty sold for much less than its value, constitutes a good defense.—*Stone v. Day*, S. C. Tex., Oct. 25, 1887; 5 S. W. Rep. 642.

200. POOR—Duty of Poor Master.—When a person is received at the poor farm and cared for by the poor master, the master is responsible for such care and attention as ordinary prudence requires, though the party was brought there without authority.—*Meier v. Paulus*, S. C. Wis., Nov. 22, 1887; 35 N. W. Rep. 301.

201. POSSESSION—Declarations.—The declarations of one claiming an adverse possession of land and the understanding of his neighbors, is competent to show the nature of his claim and possession.—*Kennedy v. Wible*, S. C. Penn., Oct. 11, 1887; 11 Atl. Rep. 98.

202. POST-OFFICE — Mails — Defrauding.—Under United States law several indictments, each of which may contain three offenses, may be brought for using the mail during one period of six months for the purpose of defrauding.—*Ex parte Henry*, U. S. S. C., Nov. 21, 1887; 8 S. C. Rep. 142.

203. PRACTICE—Appeal—Record.—Where the record shows that no order for an appeal was granted during the term of the court at which the judgment was rendered, and that the affidavit for an appeal was made after that term, the appeal will be dismissed.—*State v. Roscoe*, S. C. Mo., Nov. 28, 1887; 6 S. W. Rep. 117.

204. PRACTICE—Agreements—New Trial—Term.—Agreements between the parties about the trial must be in writing and signed by the parties, or be made in open court and noted by the judge on his minutes.—*Palaika, etc. R. Co. v. State*, S. C. Fla., Nov. 12, 1887; 3 South. Rep. 158.

205. PRACTICE — Auditor's Report — Findings.—A charge that the issues of fact and law found by the auditor are correct, unless they are found to be incorrect, includes the intrinsic evidence upon which the report was made, in the absence of a special request to charge.—*Bell v. Windsor*, S. C. Ga., July 5, 1887; 4 S. E. Rep. 100.

206. PRACTICE—Bill of Exceptions—Settlement.—An application to the supreme court to settle a bill of exceptions according to the facts must be denied when it does not state wherein the bill, as settled, is deficient,

nor the facts to be proved nor their materiality.—*People v. Bitancourt*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 744.

207. PRACTICE—Change of Venue—Affidavit. —— An affidavit for change of venue which alleges that he has reason to fear, instead of believe, that he cannot have a fair trial on account of prejudice of the judge, is not sufficient, under Wisconsin law.—*Smith v. Clarke*, S. C. Wis.. Nov. 22, 1887; 35 N. W. Rep. 318.

208. PRACTICE—Continuance—Statute.—— Under the laws of Missouri, a motion for continuance in a criminal case must be supported by an affidavit that the witnesses are not absent with the consent of the affiant; that their testimony is material, that a subpœna could not be served in time, and that the affiant believed that the testimony would be true.—*State v. Bryant*, S. C. Mo., Nov. 28, 1887; 6 S. W. Rep. 102.

209. PRACTICE—Deposition—Examination.——Where the deposition of the defendant is excluded because he is in the court room, and the plaintiff then calls him as a witness, the error of excluding the deposition is not thereby waived by the plaintiff.—*Meier v. Paulus*, S. C. Wis., Nov. 22, 1887; 35 N. W. Rep. 301.

210. PRACTICE—Dismissal—New Suit.——After a trial has been had and the verdict has been set aside, the plaintiff may dismiss and bring a new suit.—*Phelps v. Winona, etc. R. Co.*, S. C. Minn., Nov. 30, 1887; 35 N. W. Rep. 273.

211. PRACTICE—Foreclosure—Parties.——Where, in a bill to foreclose a mortgage, the widow, heirs and administrator of the mortgagor were made defendants, it was error to render judgment against them.—*Pillow v. Sentelle*, S. C. Ark., Oct. 22, 1887; 5 S. W. Rep. 783.

212. PRACTICE—Instructions.——It is proper for the court to explain and comment on the testimony, giving his opinion upon questions of fact, provided he submits those questions to the jury for their determination.—*United States v. Philadelphia R. Co.*, U. S. S. C., Nov. 7, 1887; 8 S. C. Rep. 77.

213. PRACTICE—Jury—Colored Persons.——The reason assigned for not quashing a *venire facias* composed of colored men was that the prisoner and prosecutrix were colored, and the jury were intelligent and qualified to serve: *Held*, that the motion was properly overruled, it not appearing that the same reasons operated in summoning the jury.—*Coleman v. Com.*, S. C. App. Va., Nov. 17, 1887; 3 S. E. Rep. 878.

214. PRACTICE—Jury — Discovery — Accounting. —— Where the defendants are charged with jointly conspiring to obtain money belonging to the plaintiffs, and with appropriating the same, and the answer admits the receipt of a stated sum of money, and is a general denial, either party may demand a jury, though a discovery and a full account are prayed and the declaring and enforcing of an equitable lien is asked.—*Chapman v. Lee*, S. C. Ohio, Nov. 1, 1887; 13 N. E. Rep. 736.

215. PRACTICE—New Trial—Prejudiced Juror.——On a motion for a new trial, evidence that a juror had formed an opinion before hearing the case, is properly excluded.—*Bridger v. Asheville, etc. R. Co.*, S. C. S. Car., Nov. 1, 1887; 3 S. E. Rep. 860.

216. PRACTICE — Partition — Irregularities.——Where an action of partition is brought before the clerk of the superior court who, after issues of fact are joined, transfers the case to the court in term, and the parties agree upon the facts and submit the case to the court for judgment, all irregularities as to the bringing of the action are cured.—*Foreman v. Hough*, S. C. N. Car., Nov. 21, 1887; 3 S. E. Rep. 912.

217. PRACTICE — Trial—Change of Judge.——When a district judge recuses himself and calls in the judge of a neighboring district to try the cause, the latter may do so after nine months have elapsed.—*McKenzie v. Wooley*, S. C. La., Oct. 21, 1887; 3 South. Rep. 128.

218. PRACTICE — Trial—Submission of Issues.——It is discretionary, under Texas laws, with the court to submit special issues, and when a case is submitted on special issues no general charge is necessary.—*Cole v. Crawford*, S. C. Tex., Nov. , 1887; 5 S. W. Rep. 646.

219. PRACTICE—Trial—Points for Charge.——Where a party requests the court to charge upon the effect of certain hypothetical facts, which there is evidence to sustain, if believed by the jury he is entitled to an affirmance or denial of the propositions of law submitted by him.—*Kraft v. Smith*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 370.

220. PRACTICE — Province of Jury. —— In construing testimony, reasonable inferences and deductions may be made, and conclusions may be reached that lie beyond the mere letter of the evidence.—*White v. Hammond*, S. C. Ga., April 6, 1887; 4 S. E. Rep. 102.

221. PRACTICE — Verdict — Refusal to Accept. —— Where the verdict is contrary to the instructions, which were correct, it is proper to refuse to accept the verdict and to send the jury back to correct it.—*Newell v. Wilgus*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 365.

222. PRINCIPAL AND AGENT—Commissions—Shipments. ——Where an agent, advised of the probable departure of the ship, about June 11, made contracts for June shipment, which the parties canceled, because the ship was delayed and did not arrive in time, and then the agent made contracts at a reduced rate, but the highest then obtainable: *Held*, that the agent was entitled to his commissions.—*Stumore v. Shaw*, Md. Ct. App., October Term, 1887; 11 Atl. Rep. 360.

223. PRINCIPAL AND AGENT—Duties—Notes.——Where an agent sells machines for a principal and is required to take first liens on crops, but sells the machines to insolvents, against whom he had prior liens, he is responsible to his principal for the loss so sustained. If the principal takes the notes so received and fails to collect them or compromises them, he cannot hold the agent for the loss.—*Tate v. Marco*, S. C. S. Car., Nov. 28, 1887; 4 S. E. Rep. 71.

224. PRINCIPAL AND SURETY — Confession — Rights of Sureties.——An exception and answer by sureties to an agreement by the principal, that the claim is just and agreeing that plaintiffs may take judgment, which does not deny the justness of the claim nor assent any defense, is properly stricken out on motion.—*Siddall v. Goggan*, S. C. Tex., Oct. 25, 1887; 5 S. W. Rep. 668.

225. PUBLIC LANDS—Decree—Patent.——The natural boundaries described in a decree will overrule the distances and courses described in the patent for public lands issued under the decree.—*People v. San Francisco*, S. C. Cal., Nov. 30, 1887; 15 Pac. Rep. 747.

226. PUBLIC LANDS — Land Office — Review. ——The courts can only review the decisions of the land department, if it errs in the law, or fraud is practiced on it, or if its officers are guilty of fraud, only when a controversy arises between private parties founded on their decisions.—*Downs v. Hubbard*, U. S. S. C., Oct. 31, 1887; 8 S. C. Rep. 85.

227. PUBLIC LANDS — Patents — Setting Aside.——To set aside a patent to public land for fraud, the evidence must be clear, unequivocal and convincing. Fraud on the part of the patentee does not vitiate the title of a *bona fide* purchaser for value without notice. Known mines on public lands to effect a purchaser under the pre-emption law must be actual and opened mines.—*Colorado, etc. Co. v. United States*, U. S. S. C., Nov. 21, 1887; 8 S. C. Rep. 131.

228. PUBLIC LANDS—Patent—Trust.——Where public land is purchased and a patent issued, which recites that the patentees are to hold in trust for certain beneficiaries, such recital is conclusive that a trust only is conveyed by the patent.—*Dean v. Long*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 34.

229. PUBLIC LANDS—Sheriff's Sale.——Where one acquired land by grant from the United States in 1810, but the surveyor's plat was not returned and recorded before 1833, it was held that as between him and parties other than the United States, he had, during the period between the years 1810 and 1833, such a title to the land as would be subject to sheriff's sale.—*Hammond v. Johnston*, S. C. Mo., Nov. 28, 1887; 6 S. W. Rep. 83.

230. PUBLIC LANDS—Swamp—Right to Purchase.——An application for a purchase of swamp land, sworn to before a commissioner of the United States circuit court, is void. Still such party, the plaintiff, can contest the defendant's right to purchase.—*Garfield v. Wilson*, S. C. Cal., Nov. 29, 1887; 15 Pac. Rep. 620.

231. QUIETING TITLE—Pleading.——An action to quiet title cannot be supported unless the complaint alleges that the plaintiff is in possession, or that the lands are unoccupied. Without these allegations the plaintiff must be remitted to his action of ejectment.—*Gage v. Curtis*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 30.

232. RAILROAD—Construction—Raising Grade.——Although the building of a railroad was by legislative grant, depriving an adjacent owner from enjoying his premises by preventing ingress and egress, or by flooding the same, the injury was direct and actionable.—*Louisville, etc. R. Co. v. Findley*, Ky. Ct. App., Nov. 12, 1887; 5 S. W. Rep. 753.

233. RAILROADS—Killing Stock—Negligence.——Now, where stock is unavoidably killed by a railroad train, the company is not liable.—*Sacannah, etc. R. Co. v. Rice*, S. C. Fla., Nov. 12, 1887; 3 South. Rep. 170.

234. RAILROADS — Stock-killing — Negligence. —— A verdict against a railroad for killing stock can be sustained under a special finding that the engine was running negligently and carelessly, regardless of the controverted question whether the fence of the company was properly kept up.—*Baker v. Chicago, etc. R. Co.*, S. C. Iowa, Dec. 13, 1887; 35 N. W. Rep. 460.

235. RAILROAD—Negligence—Contributory Negligence. ——It is negligence for an engineer to push on his locomotive, although he sees a man on the track and another making signals to him; in such a case the contributory negligence of the deceased will not bar recovery.—*Palmer v. Chicago, etc. Co.*, S. C. Ind., Nov. 15, 1887; 14 N. E. Rep. 70.

236. RECOGNIZANCE — Criminal Practice.——When a defendant is brought before a justice and he finds the offense is more serious than he has power to deal with, it is his duty to hold the defendant in a recognizance to appear before the court that has jurisdiction of the case.—*Butler v. State*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 247.

237. REMOVAL OF CAUSE — Citizenship—Striking Out Party.——Where, upon a refusal to transfer a cause to the federal court, a party plaintiff is stricken out, when the cause becomes transferable, it will be transferred. —*Cugler v. Smith*, S. C. Ga., July 5, 1887; 4 S. E. Rep. 106.

238. RAILROAD—Right of Way—Oral License.——Where a railroad has been built over the lands of a party who gave only an oral license and did not formally concede the right of way, the railroad company is responsible for the price of such right of way to the subsequent purchaser of the land.—*Beck v. Louisville, etc. Co.*, S. C. Miss., Dec. 5, 1887; 3 South. Rep. 252.

239. SCHOOL DISTRICT — Statutes—Pleading.——Construction of the Illinois statutes relative to the formation of new school district. A plea to a proceeding of *quo warranto*, with reference to the office of school director, is fatally defective if it fails to aver that the district in question contains not less than ten families.—*Carrico v. People ex rel.*, S. C. Ill., Nov. 9, 1887; 14 N. E. Rep. 66.

240. STATUTES —Construction—Repeal.——The legislature may make the title of an act as restrictive as it pleases, and anything in the statute beyond that will be of no effect. A statute is not repealed by a later one, unless there is a positive repugnancy between the two, or the latter was clearly intended to prescribe the only rule to govern the matter, or it revises the subject-matter of the former or expressly repeals it.—*State v. Palmer*, S. C. Fla., Nov. 23, 1887; 3 South. Rep. 171.

241. TAXATION — Assessment. —— Municipal taxes must be *ad valorem*, and an assessment made by the proper authorities without fraud or collusion is final and conclusive on the value.—*Augusta v. Pearce*, S. C. Ga., May 3, 1887; 4 S. E. Rep. 104.

242. TAXATION — Certificate — Redemption. —— One who holds a tax-certificate, which the purchaser transferred to him merely by indorsement, is the party to give the notice to redeem. The owner, unless redeeming according to the statute, must know at his peril that he is dealing with the owner of the certificate.—*Swan v. Whaley*, S. C. Iowa, Dec. 8, 1887; 35 N. W. Rep. 440.

243. TAXATION—Deed—Internal Improvement Lands. ——A tax-deed for land sold under the revenue act of 1872, is *prima facie* evidence that the assessment was lawfully made, and that a warrant was annexed to the assessment roll delivered to the collector. Internal improvement fund lands become liable to taxation as private property when entered by a person at the proper office and evidence of the entry obtained.—*Mundee v. Freeman*, S. C. Fla., Nov. 11, 1887; 3 South. Rep. 153.

244. TAXATION—Gifts—Exemption.——Land given to the Wagner Free Institute of Science, subsequent to the supplement to its act of incorporation, which it rents out, is not exempt from taxation.—*Appeal of Wagner, etc.*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 402.

245. TAXATION—Income — Uniformity. —— Railroads can be taxed on their income, and be made to contribute to the salary and expenses of the State railroad commissioner.—*Charlotte, etc. R. Co. v. Gibbes*, S. C. S. Car., Oct. 18, 1887; 4 S. E. Rep. 49.

246. TAXATION—Municipal Corporations—Statute—Toll Bridge.——Under the laws of Illinois, the property of a city, used for city purposes, such as markets, fire engines, etc., are exempt from taxation, but a toll bridge belonging to a city, and used chiefly or altogether for its benefit, is not so exempt.—*People v. City of Moline*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 32.

247. TAXATION — Notice — Redemption. —— Where a statute requires that notice of the time when the right of redeeming lands sold for taxes shall expire, must be given to the party in possession, a notice that the time will expire on September 13, 1875, will not be sufficient if the time does not actually expire before October 31, 1875.—*Gage v. Davis*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 36.

248. TAXATION — Payment—Undervaluation.——Payment of a tax before the meeting of the commissioners of appeal does not deprive the commissioner's power of increasing the tax on a complaint of undervaluation.—*State v. Jersey City*, S. C. N. J., Nov. 26, 1887; 11 Atl. Rep. 348.

249. TAXATION—Sale—Combination.——Where A bids off the land for B at a tax-sale for B, under an agreement to take turns in bidding, the tax-deed should be set aside.—*Frank v. Arnold*, S. C. Iowa, Dec. 12, 1887; 35 N. W. Rep. 453.

250. TELEGRAMS—Delivery—Damages.—— Where the agent of a telegraphic company delays the delivery of a message notifying a branch bank of the assignment of its principal, during which delay the agent draws out his money and that of his principal and other money is paid out, the telegraphic company is liable for the money so paid out.—*Stiles v. Western, etc. Co.*, S. C. Ariz., Dec. 1, 1887; 15 Pac. Rep. 712.

251. TENANT IN COMMON—Adverse Possession. ——A tenant in common cannot, in North Carolina, acquire the whole title by an adverse possession, short of twenty years.—*Breeden v. McLaurin*, S. C. N. Car., Dec. 5, 1887; 4 N. E. Rep. 136.

252. TROVER—Agent—Sale on Credit.——Trover cannot be brought for goods sold on credit by an agent contrary to instructions when the purchaser was ignorant of the agent's instructions. The suit should be on the case against the agent for breach of contract or violation of his instructions.—*Loveless v. Fowler*, S. C. Ga., April 7, 1887; 4 S. E. Rep. 103.

253. TRUST—Confidential Relations—Agent—Surveyor. ——One who makes abstracts of title as his profession holds confidential relations with those who employ him, and if he buys for himself the land he was employed to look up the title of, he holds such land as

trustee for his employer.—*Vallette v. Fedens*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 52.

254. TRUST — Remainder — Contingent Remainder — Statute.——Under the laws of Kentucky, one holding property upon which a contingent remainder is limited, may, in a proper case, cause such property to be sold and the proceeds reinvested upon the same trusts, making the persons holding the contingent interest parties to the proceeding.—*McGinnis v. Peters*, Ky. Ct. App., Dec. 13, 1887; 6 S. W. Rep. 119.

255. USURY—Defense—Other Transactions.——Usury is one transaction and cannot be set up as a defense in a suit on other transactions.—*Taylor v. Breisch*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 388.

256. USURY—Payment by Heir—Recovery—Mortgage. ——When an heir pays a usurious debt to release the inheritance from an incumbrance, the right of action to recover the usurious interest so paid is in him. Whether a deed is absolute or a security for a loan depends entirely upon the interest of the parties and not on the language used.—*Pope v. Marshall*, S. C. Ga., May 4, 1887; 4 S. E. Rep. 116.

257. VENUE—Change of Venue—Criminal Practice.—— Upon an application for a change of venue in a criminal case, it is competent for the court to examine a witness as to the bias or prejudice of defendant in the county after the compurgators have testified.—*Henning v. State*, Tex. Ct. App., Nov. 16, 1887; 6 S. W. Rep. 137.

258. VENUE—Change of Venue—Statute.——Construction of Missouri statutes relative to the proceedings to be had for a change of venue in criminal cases: *Held*, that a change of venue may as well be had on count of the bias of a special judge as of a regular judge of the court.—*State v. Shipman*, S. C. Mo., October Term, 1887; 6 S. W. Rep. 97.

259. WAREHOUSEMAN — Negligence.——In an action against a warehouseman for loss of cotton by fire, the court should have instructed the jury that the defendant would not be liable unless an ordinary prudent man would not have permitted his cotton to have remained in such close proximity to so combustible a building as an oil mill.—*Merchants' Wharf Boat Ass'n v. Smith*, S. C. Miss., Dec. 5, 1887; 3 South. Rep. 249.

260. WATERS —Water-courses.——Where, in an action for diverting the water of a stream, the plaintiff alleged that the defendant's mill-race carried all the water beyond the plaintiff's land, and defendant averred that there was always water enough in the stream for plaintiff's purposes: *Held*, that this raised a question of fact for a jury.—*New York, etc. Co. v. Rothery*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 269.

261. WATERS—Water-courses.——Where an action is brought to restrain the defendant from digging a ditch, which would increase the flow of water upon plaintiff's land, the action cannot be sustained if the area of land drained is not increased and no substantial damage done to the plaintiff.—*Jeffers v. Jeffers*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 316

262. WHARVES—Liability of Owner—Care—Diligence. ——The owner of a wharf is liable for damages accruing by reason of its unsafe condition unless he can show due care and diligence.—*Smith v. Hacemeyer*, U. S. D. C. (N. Y.), Nov. 18, 1887; 32 Fed. Rep. 814.

263. WILL—Conditional Bequest.—— Where a testator directed that the interest on $5,000 should be paid to his wife during her life upon condition that certain money should be paid to him or his executors, and part of that money is paid and the remainder secured by a mortgage: *Held*, that the condition was fulfilled.—*Barnett v. Barnett*. N. J. Ct. Chan., Nov. 12, 1887; 11 Atl. Rep. 119.

264. WILL—Contingency — Codicil—Construction.—— Where a testator made his will by which he gave certain legacies to other persons contingent upon the death of himself and wife during a specified period, but declaring the will to be void or voidable at the election of his wife if she should survive him, and afterwards made an absolute codicil giving his whole estate to his wife: *Held*, that the codicil and will should be construed together, that his wife took the whole estate without reference to the legacies.—*Urey v. Urey*, Ky. Ct. App., Dec. 1, 1887; 5 S. W. Rep. 859.

265. WILL—Devise—Charge.——Where a testator devises the residue of his estate to his son, for which bequests he orders the son to pay all his just debts, his debts are a charge on the estate so devised.—*Appeal of Thompson*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 455.

266. WILL—Devise—Per Stirpes.——Where a will directed that, at the death of the testator's brother, his real estate should be divided among his legal heirs, share and share alike, the heirs took *per stirpes*.—*Appeal of Alston*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 367.

267. WILL — Devise—Shelly's Case.——A devise to a man during life, and after his death to his heirs, falls under the rule in Shelly's case.—*Little's Appeal*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 520.

268. WILL—Devisavit Vel Non.——In an application for an issue *devisavit vel non*, if the verdict is against the will and the court on a review would not set aside the verdict, an issue to determine the dispute should be directed.—*Herster v. Herster*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 410.

269. WILL—Executor—Powers.——Where, by a will, a testator authorized his executors to settle with the partners of a firm of which he had been a member and to loan to the firm the money which was due to him, and he did so settle and took the notes of the partners for the amount agreed upon: *Held*, that the executor had properly exercised the discretion conferred upon him, and that under the will he had the power to make such settlement.—*Ilse v. Ilse*, Ky. Ct. App., Dec. 17, 1887; 6 S. W. Rep. 120.

270. WILL—Land Devised to Sell—Debts.——Where land is desired to be sold seven years after the testator's death, it is converted from the time of his death, and the Pennsylvania act of February 24, 1834, as to the lien of decedent's debts, does not apply.—*McWilliams' Appeal*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 383.

271. WILL—Trust Fund—Revocation by Trustee.—— Where a wife wills a trust fund in her favor to her husband, and the trustee, prior to her death, invests the fund in real estate in her name, the husband takes the property under the will.—*Horner v. Clements*, N. J. Ct. Chan., Nov. 22, 1887; 11 Atl. Rep. 465.

272. WILL—Undue Influence — Bigamous Marriage—Evidence.——In an action contesting the validity of a will on the ground of undue influence, it is competent to show that the marriage of testator was bigamous.—*McClure v. McClure*, S. C. Tenn., Dec. 10, 1887; 6 S. W. Rep. 44.

273. WITNESS—Agent—Deceased Principal.——In an action against an administrator on an account contracted by an agent of the deceased, such agent is a competent witness to prove his agency and its extent.—*Garrett v Trabue*, S. C. Ala., May 5, 1887; 3 South. Rep. 149.

274. WITNESS—Deceased Party—Partnership—Statute. ——Under the statute of Tennessee a partner is not a competent witness to prove a transaction between a deceased partner and another person for the benefit of his partners.—*Godfrey v. Templeton*, S. C. Tenn., Nov. 4, 1887; 6 S. W. Rep. 47.

275. WITNESS — Discrediting — Decoy Letters.——A witness who had resorted to the strategem of using decoy letters to detect a person suspected of using the mail for unlawful purposes, is not discredited thereby.—*United States v. Slenker*, U. S. D. C. (Va.), Oct. 31, 1887; 32 Fed. Rep. 691.

276. WITNESS—Husband and Wife.——In an action by infants claiming property as the heirs of their mother, the father is a competent witness for the children as to any transactions occurring since the mother's death and affecting their title.—*Dugger v Dugger*, S. C. App. Va., Dec. 1, 1887; 4 S. E. Rep. 171.

277. WITNESS—Privilege.——A witness may be properly asked whether a woman is deservedly of good

repute, as his answer to such question cannot criminate him.—*McFadden v. Reynolds*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 638.

278. WITNESS — Transactions with Deceased. ——A witness can testify as to what occurred between him and a deceased party, whose estate is suing him, when the evidence is brought out on cross examination. He can also testify as to his transactions with the executor. —*Moore v. Dutson*, S. C. Ga., Nov. 12, 1887; 4 S. E. Rep. 169.

279. WITNESS—Transactions with Deceased — Parent and Child — Compensation. ——Where one rendering services for another is a member of his family, compensation therefor cannot be allowed, unless it is shown that compensation therefor was expected by both parties. The claimant, in a suit against the estate of the other, cannot testify as to the nature of the services and whether he expected compensation therefor. — *Cowan v. Musgrave*, S. C. Iowa, Dec. 12, 1887; 35 N. W. Rep. 496.

280. WRIT—Amendment of Writ—Misnomer.——Where there has been a misnomer of a defendant in a criminal case, as putting J W for John W, an amendment of the writ is permissible.—*Hutchings v. State*, Tex. Ct. App., Nov. 9, 1887; 6 S. W. Rep. 34.

281. WRIT—Notice — Publication.——An affidavit for notice by publication must show some grounds for the assertion, that the defendant is not to be found within the jurisdiction, the mere assertion of that fact, without more, is not sufficient.—*McDonald v. Cooper*, U. S. C. C. (Oreg.), Nov. 28, 1887; 32 Fed. Rep. 745.

282. WRIT—Publication—Notice.——A writ or notice by publication need not state all the parties to the action, but only those sought to be affected by it. Such writ, on notice, is sufficient if it informs the party whom he is required to answer, and when and where, and upon what grounds.—*Head v. Daniels*, S. C. Kan., Dec. 10, 1887; 15 Pac. Rep. 911.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERY NO. 3.

A B was arrested upon a complaint charging him with unlawfully selling intoxicating liquors without first having obtained a license, as provided by ordinance, and contrary to the ordinance of the city of Canton, etc. Defendant's counsel moved to dismiss the action for the reason that the police court had no jurisdiction to try and determine an offense under the city ordinance which was a misdemeanor under the general laws of the Territory, and therefore an indictable offense. That said ordinance was unconstitutional, etc. The defendant's motion was sustained. City attorney appeals on behalf of the city. Question: Where a city, by its charter, has express authority to regulate, suppress and prohibit the sale of intoxicating liquors within its limits, and a general power to enforce and punish for a violation of its ordinances, and the Territory is authorized by its organic act to create such municipal corporations without any limitation of such authority, has the police court of the city jurisdiction of an action charging a defendant with a violation of its ordinances prohibiting the sale of selling intoxicating liquor, although the same act may be a violation of the general laws of the Territory and indictable by the grand jury? See Wong v. City of Astoria, 11 Pac. Rep. 295; State v. Oleson, vol. 1, Crim. L. M. & Rep. 589; 21 Minn. 202. Please cite authorities. K. C. S.

QUERIES ANSWERED.

QUERY NO. 2. [*26 Cent. L. J. 47.*]

Does the act regulating the removal of causes from State to federal courts, passed at the second session of the forty-ninth congress, merely extend by its second section the time within which, in proper cases, a removal will be ordered? Cannot a non-resident party have a removal ordered at any time upon showing to the satisfaction of the circuit court that he cannot obtain justice in any State court? B. & S.

Answer. The object of the act was to restrict, not enlarge, the right of removal. Woolf v. Chisolm, 30 Fed. Rep. 881; Dwyer v. Peshall, 32 Fed. Rep. 497. The application for removal must, under § 3, be made on or before the time to answer or plead, except in cases of prejudice, where, under § 2, it may be made before trial. The general effect of § 2 is to limit the removal to the application of non-resident defendants. It has, however, been held (County of Yuba v. Pioneer Gold M. Co., C. C. N. D. Cal., 32 Fed. Rep. 183), that under this law the court cannot take cognizance of a suit against a non-resident, either originally or by removal. There are other decisions which concede the jurisdiction in cases of removal. Fales v. Chicago, etc. R. Co., C. C. N. D. Iowa, 32 Fed. Rep. 673. The law is so bunglingly constructed as to be a disgrace to congress. W. B.

JETSAM AND FLOTSAM.

BUSINESS BEFORE PLEASURE.—Judge (to sheriff) —I wish you would make those men stop firing off their guns out on the square.

The Sheriff soon returns—Your honor, the McJacobs and O'Haras are killing each other.

Judge—All right. I thought a party of idle fellows were firing their guns to make a noise. Didn't know that business was being transacted. Call the next case.

YOUNG LAWYER—" I earned my first professional fee yesterday."

Young Doctor—"Indeed! Allow me to congratulate you. What was it for?"

Young Lawyer—"I drew a conveyance."

(It seems that his landlady remitted a week's board on condition that he trundled the baby out for an airing.)

SAID a judge in a Western police court:—"And you say you did not strike the plaintiff until he became abusive?

"That's it, jedge."

"Tell the court what he said."

"He called me a hoss-thief."

"That won't excuse your conduct. A man might call *me* a horse-thief all day, but"—

"Yes," interrupted the defendant, "but I guess you've never been one, jedge, and you don't know how it riled me!"